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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

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Federal Communications Commission Record

Volume 3
Issue 11

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iv

Table of Docket Numbers..... vi

Table of Rulemaking Numbers..... vii

Table of Localities.....viii

Table by Subject Matter..... ix

Table by Statutory and Rule Provisions..... xii

Decisions, Reports, Memorandum Opinions, Orders, and
Other Selected Material.....2985

Federal Communications Commission Record

Table of Cases
Volume 3
Issue 11

Case Name	Page
AT&T Communications v. Pacific Bell Telephone Co., Inc.	3147
Amateur Operator Requirements	2989
Annual 1988 Access Tariff Filings - Phase II	3103
Atlantic Richfield Company	3080
Atlantic Richfield Company	3089
Availability of FCC Rules in Loose-Leaf Form	3151
Barker Broadcasting Co., Inc.	3189
Boudreaux, Jeffrey L.	3186
CCI Cablevision v. Northwestern Indiana Telephone Company, Inc.	3096
Contel Cellular of Richmond, Inc.	3001
Daystar Radio, Ltd.	3020
Eau Claire Cellular Telephone Company, L.P.	3081
FM/TV Booster Stations	2985
Fordham, Gaynell L.	3088
Franklin, Charles E.	3022
Gary, Albert E.	2997
Height and Power Increases in PLMRS	3150
Hilding, Eric R.	3193
Identification Procedure for Amateur Stations	2988
Interconnection Plan for Voice Message Service	3154
Kahn, Malcolm	3024
MCI Telecommunications Corporation	3155
MCI Telecommunications Corporation	3146
Mountain States Telephone & Telegraph Company	3135
National Gateway Telecom, Inc.	2995
New England Telephone and Telegraph Co.	3102
New York Telephone Company	2993
Pacific Bell	3082
Page America of Illinois, Inc.	3148
Panhandle Communications, Inc.	3026
Ram Communications of Michigan, Inc.	3101
Seattle Public Schools and Jack Straw Memorial Foundation	3028
South Central Bell Telephone Co.	2991
Southland Broadcasting Co., Inc.	3018
Southwestern Bell Telephone Co.	2992
Stearns County Broadcasting Company, Inc.	2987
Table of Allotments, FM, Aberdeen, MS	3119
Table of Allotments, FM, Bethalto and Collinsville, IL	3068
Table of Allotments, FM, Byng, OK	3071
Table of Allotments, FM, Campbellsville, KY	3078
Table of Allotments, FM, Cannelton, IN	3008
Table of Allotments, FM, Canton, NY	3006

Case Name	Page
Table of Allotments, FM, Carthage, IL	3115
Table of Allotments, FM, Chelan,WA	3125
Table of Allotments, FM, Corcoran, Kernville and Mendota, CA	3121
Table of Allotments, FM, Covington, PA	3181
Table of Allotments, FM, Crystal Falls, MI	3072
Table of Allotments, FM, Dunn, Fuquay-Varina, NC , et al	3009
Table of Allotments, FM, Earl Park, IN	3124
Table of Allotments, FM, Fairbury, NE	3012
Table of Allotments, FM, Fort Valley and Wrightsville, GA	3159
Table of Allotments, FM, Garden City, IN	3069
Table of Allotments, FM, Georgetown, Martin and San Saba, TX	3168
Table of Allotments, FM, Hilo, HI	3113
Table of Allotments, FM, Holyoke, CO	3004
Table of Allotments, FM, Jasper, TX	3177
Table of Allotments, FM, Joshua Tree, CA	3117
Table of Allotments, FM, Kingsville, TX	3179
Table of Allotments, FM, LaMonte, MO	3173
Table of Allotments, FM, LaSalle, IL	3075
Table of Allotments, FM, Lexington, MI	3175
Table of Allotments, FM, Lisbon, NH	3005
Table of Allotments, FM, Lompoc and Orcutt, CA	3134
Table of Allotments, FM, London and Xenia, OH	3132
Table of Allotments, FM, London, KY	3108
Table of Allotments, FM, Macomb, IL	3074
Table of Allotments, FM, Mecca, CA	3171
Table of Allotments, FM, Mexico Beach, FL	3109
Table of Allotments, FM, Middleport, OH	3128
Table of Allotments, FM, Murray, KY	3016
Table of Allotments, FM, Olive Branch, MS	3131
Table of Allotments, FM, Owensville, MO	3127
Table of Allotments, FM, Port St. Lucie, FL	3014
Table of Allotments, FM, Rochester, MN	3166
Table of Allotments, FM, Saint Robert, MO	3183
Table of Allotments, FM, Star Lake, NY	3167
Table of Allotments, FM, Statesboro, GA	3076
Table of Allotments, FM, Steamboat Springs, CO	3007
Table of Allotments, FM, Steelville and Hermann, MO	3073
Table of Allotments, FM, Topsail Beach and Wilmington, NC	3129
Table of Allotments, FM, Uniontown, AL	3161
Table of Allotments, FM, University Park, PA	3070
Table of Allotments, FM, Waupun, Mayville and New Holstein, WI	3163
Table of Allotments, FM, Waynesboro, GA	3111
Table of Allotments, FM, Winfield, TX	3126
Table of Allotments, TV, Lewisburg, WV	3003
Teleport International Ltd. and American Satellite Co.	3157
Valmedia, Inc.	3184
Vetter Communications Company	3152

Case Name	Page
Wabash Valley Community Radio Corporation	3017
Welch, Bill	3158
White Mountain Radio	3188
Wodlinger, Mark L.	3139
Zozaya, Julia S.	3190

Table of Cases by Delegated Authority and FCC Number
Volume 3
Issue 11

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 88-0315	2993	DA 88-0755	3073
DA 88-0602	3132	DA 88-0756	3074
DA 88-0654	3134	DA 88-0757	3075
DA 88-0670	2995	DA 88-0758	3076
DA 88-0687	2992	DA 88-0759	3078
DA 88-0688	3017	DA 88-0761	3188
DA 88-0695	2997	DA 88-0762	3189
DA 88-0702	3080	DA 88-0763	3151
DA 88-0703	3018	DA 88-0767	3148
DA 88-0709	2991	DA 88-0768	3150
DA 88-0711	3020	DA 88-0770	3157
DA 88-0712	2985	DA 88-0771	3108
DA 88-0720	3003	DA 88-0772	3109
DA 88-0721	3004	DA 88-0773	3111
DA 88-0722	3005	DA 88-0774	3159
DA 88-0723	3006	DA 88-0775	3113
DA 88-0724	3007	DA 88-0776	3161
DA 88-0725	3008	DA 88-0777	3115
DA 88-0726	3009	DA 88-0778	3117
DA 88-0727	3012	DA 88-0779	3119
DA 88-0728	3102	DA 88-0780	3121
DA 88-0729	2989	DA 88-0781	3190
DA 88-0730	3022	DA 88-0782	3193
DA 88-0731	3024	DA 88-0786	3124
DA 88-0732	3026	DA 88-0787	3125
DA 88-0734	3001	DA 88-0788	3126
DA 88-0735	3103	DA 88-0789	3127
DA 88-0736	3081	DA 88-0790	3128
DA 88-0737	3014	DA 88-0791	3129
DA 88-0738	3016	DA 88-0792	3131
DA 88-0740	3184	DA 88-0798	3183
DA 88-0741	3146	DA 88-0799	3166
DA 88-0742	3147	DA 88-0800	3167
DA 88-0743	3101	DA 88-0801	3168
DA 88-0744	3154	DA 88-0802	3171
DA 88-0746	3186	DA 88-0803	3173
DA 88-0750	3068	DA 88-0804	3175
DA 88-0751	3069	DA 88-0805	3177
DA 88-0752	3070	DA 88-0806	3179
DA 88-0753	3071	DA 88-0807	3181
DA 88-0754	3072	DA 88-0810	3163

Delegated Authority or FCC Number	Page
FCC 88-0023	3089
FCC 88-0166	3096
FCC 88-0167	3135
FCC 88-0168	2988
FCC 88-0173	2987
FCC 88-0174	3082
FCC 88-0176	3088
FCC 88-0181	3152
FCC 88-0182	3158
FCC 88-0183	3155
FCC 88D-017	3028
FCC 88R-029	3139

Table of Cases by Docket Number
Volume 3
Issue 11

Docket Number			Page
CC	Dkt.No.88 -	1	3103
CC	Dkt.No.88 -	135	3150
CC	Dkt.No.88 -	180	2992
MM	Dkt.No.84 -	1256	2987
MM	Dkt.No.86 -	27	3129
MM	Dkt.No.86 -	34	3134
MM	Dkt.No.86 -	49	3028
MM	Dkt.No.86 -	109	3139
MM	Dkt.No.87 -	13	2985
MM	Dkt.No.87 -	119	3088
MM	Dkt.No.87 -	181	3124
MM	Dkt.No.87 -	190	3132
MM	Dkt.No.87 -	231	3075
MM	Dkt.No.87 -	232	3068
MM	Dkt.No.87 -	243	3126
MM	Dkt.No.87 -	259	3007
MM	Dkt.No.87 -	260	3131
MM	Dkt.No.87 -	279	3003
MM	Dkt.No.87 -	281	3125
MM	Dkt.No.87 -	283	3004
MM	Dkt.No.87 -	298	3069
MM	Dkt.No.87 -	335	3073
MM	Dkt.No.87 -	349	3108
MM	Dkt.No.87 -	355	3074
MM	Dkt.No.87 -	366	3016
MM	Dkt.No.87 -	378	3183
MM	Dkt.No.87 -	379	3072
MM	Dkt.No.87 -	409	3128
MM	Dkt.No.87 -	411	3127
MM	Dkt.No.87 -	416	3008
MM	Dkt.No.87 -	502	3167
MM	Dkt.No.87 -	509	3005
MM	Dkt.No.87 -	510	3006
MM	Dkt.No.87 -	520	3166
MM	Dkt.No.87 -	587	3071
MM	Dkt.No.87 -	588	3070
MM	Dkt.No.88 -	199	3012
MM	Dkt.No.88 -	200	3009
MM	Dkt.No.88 -	215	3078
MM	Dkt.No.88 -	217	3014
MM	Dkt.No.88 -	218	3076
MM	Dkt.No.88 -	219	3161
MM	Dkt.No.88 -	220	3113
MM	Dkt.No.88 -	221	3159
MM	Dkt.No.88 -	222	3109
MM	Dkt.No.88 -	223	3111
MM	Dkt.No.88 -	231	3171
MM	Dkt.No.88 -	232	3168
MM	Dkt.No.88 -	234	3119
MM	Dkt.No.88 -	235	3121
MM	Dkt.No.88 -	236	3115
MM	Dkt.No.88 -	237	3117
MM	Dkt.No.88 -	240	2997
MM	Dkt.No.88 -	246	3017
MM	Dkt.No.88 -	247	3018
MM	Dkt.No.88 -	248	3020
MM	Dkt.No.88 -	250	3026
MM	Dkt.No.88 -	251	3022
MM	Dkt.No.88 -	252	3024
MM	Dkt.No.88 -	254	3173
MM	Dkt.No.88 -	255	3175
MM	Dkt.No.88 -	256	3177
MM	Dkt.No.88 -	258	3181
MM	Dkt.No.88 -	265	3184
MM	Dkt.No.88 -	267	3179
MM	Dkt.No.88 -	270	3163
MM	Dkt.No.88 -	272	3189
MM	Dkt.No.88 -	273	3188
MM	Dkt.No.88 -	274	3193
MM	Dkt.No.88 -	275	3190
MM	Dkt.No.88 -	276	3186

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 3
Issue 11

Rulemaking Number	Page
RM - 5157	3129
RM - 5223	3134
RM - 5364	3129
RM - 5500	3124
RM - 5555	3150
RM - 5619	3132
RM - 5634	3073
RM - 5679	3108
RM - 5684	3004
RM - 5693	3007
RM - 5694	3068
RM - 5705	3075
RM - 5725	3115
RM - 5728	3131
RM - 5746	3016
RM - 5747	3126
RM - 5754	3069
RM - 5770	3008
RM - 5823	3003
RM - 5847	3125
RM - 5860	3074
RM - 5864	3127
RM - 5870	3072
RM - 5897	3073
RM - 5918	3111
RM - 5927	3183
RM - 5940	3128
RM - 5969	3166

Rulemaking Number	Page
RM - 6043	3132
RM - 6052	3167
RM - 6056	3005
RM - 6057	3006
RM - 6066	3068
RM - 6107	3070
RM - 6111	3071
RM - 6124	3009
RM - 6130	3117
RM - 6131	3171
RM - 6169	3014
RM - 6176	3078
RM - 6177	3159
RM - 6186	3009
RM - 6197	3119
RM - 6211	3175
RM - 6213	3161
RM - 6219	3173
RM - 6220	3113
RM - 6232	3076
RM - 6259	3109
RM - 6279	3121
RM - 6298	3177
RM - 6299	3179
RM - 6306	3012
RM - 6310	3168
RM - 6347	3181
RM - 6348	3163

Table of Cases by City
Volume 3
Issue 11

City/State	Page
Aberdeen, MS	3119
Albany, MN	2987
Bethalto, IL	3068
Billings, MT	3139
Breen, CO	3020
Byng, OK	3071
Campbellsville, KY	3078
Campton, NH	3188
Cannelton, IN	3008
Canton, NY	3006
Carington, PA	3181
Carthage, IL	3115
Catskill, NY	3024
Chelan, WA	3125
Collinsville, IL	3068
Corcoran, CA	3121
Crystal Falls, MI	3072
Delphi, IN	3017
Dothan, AL	3018
Dunn, NC	3009
Earl Park, IN	3124
Eau Claire, WI	3081
Fairbury, NE	3012
Flagstaff, AZ	3190
Fort Valley, GA	3159
Fort Valley, GA	3184
Fuquay-Varina, NC	3009
Garden City, IN	3069
Georgetown, TX	3168
Gulf Breeze, FL	3088
Hermann, MO	3073
Hilo, HI	3113
Holyoke, CO	3004
Hope Mills, NC	3009
Jasper, TX	3177
Johnsonville, SC	3022
Joshua Tree, CA	3117
Killington, VT	2997
Kings Beach, CA	3193
Kingsville, TX	3179
LaMonte, MO	3173
LaSalle, IL	3075
Lewisburg, WV	3003
Lexington, MI	3175
Lisbon, NH	3005
Lompoc, CA	3134
London, KY	3108
London, OH	3132
Macomb, IL	3074
Manchester, KY	3189
Marlin, TX	3168
Mayville, WI	3163
Mecca, CA	3171
Mexico Beach, FL	3109
Middleport, OH	3128
Minneapolis, MI	3148
Murray, KY	3016
New Holstein, WI	3163
Olive Branch, MS	3131
Orcutt, CA	3134
Owensville, MO	3127
Port Saint Joe, FL	3026
Port St. Lucie, FL	3014
Rochester, MN	3166
Rocky Mount, VA	3186
Saint Robert, MO	3183
San Saba, TX	3168
Seattle, WA	3028
St. Clair Shores, MI	3101
Star Lake, NY	3167
Statesboro, GA	3076
Steamboat Springs, CO	3007
Steelville, MO	3073
Topsail Beach, NC	3009
Topsail Beach, NC	3129
Trenton, MI	3101
Uniontown, AL	3161
University Park, PA	3070
Warren, MI	3101
Waupun, WI	3163
Waynesboro, GA	3111
Williamston, NC	3009
Wilmington, NC	3129
Winfield, TX	3126

Subject Index
Volume 3
Issue 11

Subject	Page
Adjudication	
Hearing, right to	3028
Issues, clarification of	3028
Administrative Law Judge Decision	
Comparative coverage	3139
Diversification of control of mass media	3139
Integration of ownership into management, quantitative aspect	3139
Orders or Notices	
Partnership	3028
Amateur Radio Service (ARS)	
ARS - Aliens, operation of station by	
Station identification	2988
ARS - Operating requirements and procedures	
Control operators when transmitting, requirements for	2989
Broadcast Radio Services - General Rules	
Applications for authorization	
Amendment of applications	2985
Public notice of filing of broadcast applications, local	2985
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	3004, 3005, 3008, 3009, 3016, 3068, 3071, 3072, 3075, 3076, 3109, 3111, 3117, 3119, 3125, 3126, 3129, 3131, 3161, 3183, 3168, 3171, 3177, 3179,
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Table of assignments	3003, 3132

Subject	Page
Carriers: Service Altered	
Cable television video programming facilities	
Video programming facilities by telephone common carriers	3096
Extensions and supplements	
Applications, contents of	3157
Lines outside exchange area	3096
Common Carriers: Miscellaneous Rules	
Enhanced services (computer) and customer-premises equipment	3135, 3082
Communications Act of 1934	
Construction permits	2995, 3155
Extension of lines	3096
Domestic Public Fixed Radio Services	
Applications and licenses, filing requirements	
Authorization required, station	3155
Practice and Procedure	
Common carriers: complaints	
Formal or informal	3146, 3147
Pleadings, briefs	
Informal requests for Commission action, persons may make	3155
Reconsideration/review of Commission action	
Reconsideration of a final FCC action, petition for	3148
Reconsideration on Commission's own motion	3088
Public Mobile Service	
Applications and licenses-processing	
Construction, time period allowed for	3081
Opposition to applications	3081
Domestic public cellular radio telecommunications service	
Service areas	3001
Public land mobile service	
Antenna height and erp limit	3150
Erp for various stations	3150
Technical standards	
Transmitters, no unauthorized access to	3150
Tariffs (Schedules of Rates and Regulations)	
Definitions	
Corrections	2992

Subject	Page
Terminal Equipment Connected to Network	
General information	
Purpose: protection of network from harm	3080
Scope: equipment and network connection except party line/coin	3080
Terminal equipment, conditions on use of	
Registered, equipment must be	3080

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
001.041 Informal Requests for Commission Action	3155
001.108 Reconsideration on Commission's own motion	3088
001.115 Application for Review	2987
001.117 Review on Motion of the Commission	3158
001.711 Formal or informal complaints	3146
001.711 Formal or informal complaints	3147
021.003 Station Authorization Required	3155
022.015 Technical content of applications	3101
022.030 Opposition to applications	3081
022.043 Period of construction	3081
022.117 Transmitters	3150
022.505 Antenna height-power limit	3150
022.506 Power	3150
022.903 Cellular System Service Areas	3001
061.017 Correction	2992
063.008 Lines outside of a carrier's exchange 063.54 Facilit	3096
064.702 Furnishing of Enhanced Services and CPE	3082
064.702 Furnishing of Enhanced Services and Customer-Premise	3135
068.001 Purpose	3080
068.001 Purpose	3089
068.002 Scope	3080
068.002 Scope	3089
068.005, Interconnection, customer's right of to interstate	3080
068.005, Interconnection, customer's right of to interstate	3089
068.100 General	3080
068.100 General	3089
068.102 Registration requirement	3080
068.102 Registration requirement	3089
069.004(b) Charges to be Filed	2993
073.202 FM Table of Allotments	3004
073.202 FM Table of Allotments	3007
073.202 FM Table of Allotments	3008
073.202 FM Table of Allotments	3014
073.202 FM Table of Allotments	3016
073.202 FM Table of Allotments	3068
073.202 FM Table of Allotments	3069
073.202 FM Table of Allotments	3072
073.202 FM Table of Allotments	3073
073.202 FM Table of Allotments	3074
073.202 FM Table of Allotments	3075
073.202 FM Table of Allotments	3076
073.202 FM Table of Allotments	3078
073.202 FM Table of Allotments	3108
073.202 FM Table of Allotments	3109
073.202 FM Table of Allotments	3111
073.202 FM Table of Allotments	3113
073.202 FM Table of Allotments	3115
073.202 FM Table of Allotments	3119
073.202 FM Table of Allotments	3121
073.202 FM Table of Allotments	3124

073.202 FM Table of Allotments 3125
073.202 FM Table of Allotments 3126
073.202 FM Table of Allotments 3127
073.202 FM Table of Allotments 3131
073.202 FM Table of Allotments 3134
073.202 FM Table of Allotments 3159
073.202 FM Table of Allotments 3161
073.202 FM Table of Allotments 3163
073.202 FM Table of Allotments 3166
073.202 FM Table of Allotments 3168
073.202 FM Table of Allotments 3171
073.202 FM Table of Allotments 3173
073.202 FM Table of Allotments 3175
073.202 FM Table of Allotments 3177
073.202 FM Table of Allotments 3179
073.202 FM Table of Allotments 3183
073.202, FM Table of Allotments 3005
073.202, FM Table of Allotments 3006
073.202, FM Table of Allotments 3009
073.202, FM Table of Allotments 3012
073.202, FM Table of Allotments 3070
073.202, FM Table of Allotments 3071
073.202, FM Table of Allotments 3128
073.202, FM Table of Allotments 3129
073.202, FM Table of Allotments 3167
073.202, FM Table of Allotments 3181
073.3522 Amendment of applications 2985
073.3555 Multiple Ownership 3152
073.3580 Local public notice of filing of broadcast applicat 2985
073.606 TV Table of Allotments 3003
073.606, TV Table of Allotments 3132
097.079 Control operator requirements 2989
097.313 Station identification 2988
200.214 Extension of Lines 2995
200.214 Extension of Lines 3157
300.204 lawfulness of charges/investigation 3103
300.319 Construction Permits 2995
300.319 Construction Permits 3155
500.080 - Renewal expectancy 3028
500.090 - Noncommercial educational 3028
500.125 - Misrepresentation 3028
500.3035 Integration of Ownership into Management, Quantitat 3139
500.3045 Diversification of Control of Mass Media 3139
500.3065 Comparative Coverage 3139
Computer III Requirements 3102
Computer III Requirements 3154
No cumulative chances in PLMS lotteries 3148
Part 0 - Commission Organization 3151
Part 1 - Practice and Procedure 3151
Part 69, Subparts B and C 2993
(Albert E. Gary)(Killington, Vermont) 2997
(Barker Broadcasting Co., Inc.)(Manchester, Kentucky) 3189
(Charles E. Franklin d/b/a "Franklin)(Johnsonville, South Ca 3022
(Daystar Radio, Ltd.)(Breen, Colorado) 3020

(Eric R. Hilding) (Kings Beach, California) 3193
(Jeffrey L. Boudreaux)(Rocky Mount, Virginia) 3186
(Julia S. Zozaya)(Flagstaff, Arizona) 3190
(Malcolm Kahn et al., d/b/a CATSKILL BROADCASTING)(Catskill, ... 3024
(Panhandle Communications, Inc.)(Port Saint Joe, Florida) 3026
(Southland Broadcasting Company, Inc.)(Dothan, Alabama) 3018
(Valmedia, Inc.)(Fort Valley, Georgia) 3184
(Wabash Valley Community Radio Corporation)(Delphi, Indiana) 3017
(White Mountain Radio)(Campton, New Hampshire) 3188

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-13

In the Matter of

Amendment of Part 73 of the
Commission's Rules Concerning
FM Booster Stations and
Television Booster Stations

ERRATUM

Released: May 24, 1988

Paragraph (a)(6) in 47 CFR 73.3522 and paragraphs (c)(1), (c)(1)(i), (c)(1)(ii), (c)(1)(iii), (c)(2), (c)(3), and (c)(4) in 47 CFR 73.3580 were inadvertently deleted by the *Federal Register* in its publication of the Rule amendment adopted in the *Report and Order* in the above-captioned proceeding (FCC 87-244), adopted July 16, 1987, and released August 5, 1987. Those paragraphs are hereby added pursuant to the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

APPENDIX

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154 and 303.

2. Section 73.3522 is amended by adding paragraph (a)(6) to read as follows:

§73.3522 Amendment of applications.

(a) * * * * *

(6) Subject to the provisions of §§ 73.3525, 73.3573, and 73.3580, applications for non-reserved band FM stations (other than Class D stations) may be amended as a matter of right during the appropriate window filing period pursuant to § 73.3564(d). For a period of 30 days following the FCC's issuance of a Public Notice announcing the acceptance of the application for tender, minor amendments may be filed as a matter of right; provided, however, that such amendments may not correct deficiencies in the tenderability of the underlying application. Subsequent amendments prior to designation for hearing or grant will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514. Unauthorized or untimely amendments are subject to return by the Commission without consideration. However, an amendment to a non-reserved band application will not be accepted after the close of the appropriate filing window if the effect of such amendment is to alter the proposed facility's coverage area so as to produce a conflict with an applicant who files subsequent to the initial applicant but prior to the amendment application. Similarly, an applicant subject to "first come/first serve" processing will not be permitted to amend its application and retain filing priority if the result of such amendment is to alter the facility's coverage area so as to produce a conflict with an applicant who files subsequent to the initial applicant but prior to the amendment.

* * * * *

3. Section 73.3580 is amended by adding paragraphs (c)(1), (c)(1)(i), (c)(1)(ii), (c)(1)(iii), (c)(2), (c)(3), and (c)(4) to read as follows:

§73.3580 Local public notice of filing of broadcast applications.

* * * * *

(c) * * *

(1) *Notice requirements for these applicants are as follows:*

(i) In a daily newspaper of general circulation published in the community in which the station is located, or proposed to be located, at least twice a week for two consecutive weeks in a three-week period; or,

(ii) If there is no such daily newspaper, in a weekly newspaper of general circulation published in that community, once a week for 3 consecutive weeks in a 4-week period; or,

(iii) If there is no daily or weekly newspaper published in that community, in the daily newspaper from wherever published, which has the greatest general circulation in that community, twice a week for 2 consecutive weeks within a 3-week period.

(2) *Notice requirements for applicants for a permit pursuant to section 325* (b) of the Communications Act (* * * Studios of Foreign Stations) are as follows:

(i) In a daily newspaper of general circulation in the largest city in the principal area to be served in the U.S.A. by the foreign broadcast station, at least twice a week for 2 consecutive weeks within a three-week period.

(3) Notice requirements for applicants for a change in station location are as follows. (1) In the community in which the station is located and the one in which it is proposed to be located, in a newspaper with publishing requirements as in paragraphs (c)(1)(i), (ii) or (iii) of this section.

(4) The notice required in paragraphs (c)(1), (2) and (3) of this section shall contain the information described in paragraph (f) of this section.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-1256

In re Application of

STEARNS COUNTY BROADCASTING COMPANY, INC.
Albany, Minnesota

File No. BPH-840127AC

For Construction Permit
For a New FM Station

ORDER

Adopted: May 13, 1988; Released: May 23, 1988

By the Commission: Commissioner Dennis concurring in the result.

1. Before the Commission are: (1) Stearns County Broadcasting Company, Inc.'s Application for Review filed July 25, 1986; (2) Mass Media Bureau's Opposition to Application for Review filed August 11, 1986; (3) Stearns County Broadcasting Company, Inc.'s Supplement to the Application for Review filed December 8, 1986;[1] and (4)Mass Media Bureau's Motion to Dismiss the Supplement filed December 29, 1986. These pleadings concern a Decision of the Review Board dismissing Stearns County Broadcasting Company, Inc.'s application for a new FM radio station at Albany, Minnesota without prejudice to the refiling and requesting a waiver of the one year waiting requirement of 47 C.F.R. §73.3519(a).[2]

IT IS ORDERED, That pursuant to 47 C.F.R. §1.115(g), Stearns County Broadcasting Company, Inc.'s Application for Review filed July 25, 1986 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Stearns County Broadcasting Company, Inc.'s Supplement is dismissed as an unauthorized pleading pursuant to 47 C.F.R. §1.45(c).

[2] *Stearns County Broadcasting Company, Inc.*, 104 FCC 2d 688 (Rev. Bd. 1986). Any refiling and request for waiver should be accompanied by a statement indicating what actions have been taken to ensure that no further misconduct will occur.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 97.313 of the Commission's Rules Concerning Identification Procedure for Amateur Stations Operating Under a Reciprocal Permit.

ORDER

Adopted: May 9, 1988; Released: May 24, 1988

By the Commission:

1. On May 14, 1987, The American Radio Relay League, Inc. (ARRL) filed a petition to amend Section 97.313 of the Commission's Rules, 47 C.F.R. § 97.313. ARRL proposes that the order in which the information is given in the station identification procedure for amateur stations operated by aliens under reciprocal permits be reversed. Currently, the rules require that the call sign issued by the alien's country be transmitted first, followed by the United States prefix letter and station location. ARRL states that its request is based on an International Amateur Radio Union (IARU) resolution to standardize call sign identification for stations operating under reciprocal agreements. Additionally, ARRL indicates that the United Kingdom, France, the Federal Republic of Germany and Switzerland have already implemented the IARU recommended standard.

2. We agree with ARRL that it is in the public interest to conform amateur station identification procedures to the IARU recommended standard. This minor change in procedure will have no adverse impact on the amateur community, and, in fact, will conform our Rules to the internationally recognized format. Therefore, we are amending Section 97.313 as requested by ARRL. In addition, this *Order* authorizes the Chief, Private Radio Bureau to amend the amateur service rules to require the same station identification procedure for Canadian amateur stations operated in the United States, if the existing bilateral agreement with Canada is revised to permit such procedure. *See* the Convention Between the United States and Canada Relating to the Operation by Citizens of Either Country of Certain Radio Equipment or Stations in the Other Country (T.I.A.S No. 2508).

3. In accordance with Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, the Commission certifies that this rule amendment will not have a significant economic impact on a substantial number of small entities because such entities may not use the amateur radio service for commercial radiocommunications. *See* Section 97.3(b) of the Commission's Rules, 47 C.F.R. § 97.3(b).

4. The amendment contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure or record retention requirements; and will not increase or decrease burden hours imposed on the public.

5. Because the substantive change in the rules made herein is of minor effect involving merely a reversal of the order in which station identification information is given, we find good cause to dispense with the prior notice and comment procedure of the Administrative Procedure Act. *See* Section 553(b)(B) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(B).

6. In view of the foregoing, IT IS ORDERED, pursuant to the authority contained in 47 U.S.C. §§ 154(i) and 303(r), that the petition of ARRL IS GRANTED and Part 97 of the Commission's Rules IS AMENDED as set forth in the Appendix below, effective **July 18, 1988.**

7. A copy of this *ORDER* will be forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended, as follows:

1. The authority citation for Part 97 continues to read, as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.313 is revised to read as follows:

§ 97.313 Station identification.

When the station is operated under a reciprocal permit, the call sign transmitted in the identification procedure must be that issued to the station by the licensing country, preceded by the appropriate letter-numeral designating the station location, separated by the slant mark "/" or by the word "stroke" or "slash" during radiotelephone operations. At least once during each intercommunication, the identification announcement must include the geographical location as nearly as possible by city and state, commonwealth or possession, stated in the English language.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend the Amateur Service Rules to Permit Operation by a Family Member of an Amateur Extra Class Operator.

ORDER

Adopted: May 13, 1988; Released: May 24, 1988

By the Chief, Private Radio Bureau

1. On December 20, 1987, Carroll L. Norton filed a petition to amend Section 97.79 of the Commission's Rules, 47 C.F.R. § 97.79, to authorize use of amateur stations for communications between members of the same family. The petitioner would limit such communications to families where at least one person holds an Amateur Extra Class operator license.

2. Section 97.79(b) currently requires the control operator of every amateur station to hold an amateur operator license. The petitioner seeks to permit the licensee's immediate family members not holding amateur operator licenses to be station control operators, but only for communications with the Amateur Extra Class operator. Stations with the non-licensed control operators would be designated as "auxiliary units." When performing the station identification procedure required by Section 97.84 of the Commission's Rules, 47 C.F.R. § 97.84, the petitioner suggests that the call sign for an auxiliary unit be that assigned to the Amateur Extra Class operator's station with word "auxiliary" appended. The Amateur Extra Class operator would be held fully responsible for the proper operation of all auxiliary units. In support of the requested rule changes, the petitioner merely states that they would enhance Amateur Extra Class privileges and encourage family participation in amateur radio.

3. This petition raises two major issues concerning the purposes and requirements of the amateur service. First, the Commission has determined that the amateur service should not be used as an alternative to other radio services.[1] The communications petitioner asks us to authorize here, however, are specifically provided for in the Personal Radio Services.[2] Therefore, radio communications of family members who are not licensed amateur operators should be conducted in one of the Personal Radio Services, not in the amateur service. The amateur service is for the purpose of self-training, intercommunication and technical investigations carried out by duly authorized persons interested in radio technique solely with a personal aim and without pecuniary interest. [3] It is not intended to be used for facilitating communications with unlicensed family members.

4. Second, the Commission does not exempt any amateur station control operator from the licensing requirement. The requirement that only a qualified person can hold an amateur operator license is based upon provisions in the international Radio Regulations, Nos. 2735 and 2736 (Geneva, 1979) and the Communications Act of 1934, as amended, 47 U.S.C. § 303(l)(1). Amateur station operation by persons who have not demonstrated that they are qualified to operate in the amateur service, therefore, would be inconsistent with our treaty and statutory obligations. If exemptions from the licensing requirement were granted, persons who have not demonstrated the requisite qualifications could be control operators of amateur stations. This is significant, as the Commission does not generally apply its type acceptance program to transmitters used at amateur stations. Such transmitters may be designed, constructed, modified and serviced by amateur operators who are qualified to do so by virtue of having passed examinations concerning the privileges of their licenses. Persons who have not demonstrated their technical and operational skills may not be qualified to maintain the proper signal quality from such transmitters. In the Personal Radio Services, on the other hand, Section 95.607 of the Commission's Rules, 47 C.F.R. § 95.607, specifies that all GMRS transmitters and all CB transmitters must be type accepted by the Commission. The manufacturer must prove that the transmitter meets exacting technical standards related to its usage. Thus, these services are more suitable for the communications proposed by the petitioner.

5. The petitioner, in effect, seeks to use the amateur service for a purpose not intended, *i. e.*, as a personal radio service. The amateur service in the United States, however, has fundamental objectives beyond merely engaging in communications. A primary purpose of this service is to help expand our country's reservoir of trained operators, technicians and electronics experts and to encourage their ability to contribute to the advancement of communication technology. Only amateur operators who possess the necessary technical knowledge and operating skills are capable of meeting these objectives. Thus, the purpose of the amateur service is best served by the application to all users of a licensing requirement based on demonstrated abilities.

6. IT IS THEREFORE ORDERED, pursuant to Sections 0.331 and 1.401(e) of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.401(e), that the petition to amend Section 97.79 IS DENIED. Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, review by the full Commission of this action, which is taken under delegated authority, may be requested.

FEDERAL COMMUNICATION COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] *See Order*, 48 Fed. Reg. 32999 (1983).

[2] These services consist of the General Mobile Radio Service (GMRS), the Citizens Band (CB) Radio Service and the Radio Control (R/C) Radio Service. Section 95.1 of the Commission's Rules, 47 C.F.R. § 95.1, states that the GMRS is for individual licensees and members of their families to exchange personal and business communications. Section 95.401 of the Commission's

Rules, 47 C.F.R. § 95.401, states that the CB Radio Service is a voice communication service for personal or business activities. The R/C Radio Service is for the operation of devices at remote locations.

[3] *See* ITU Radio Regulations No. 53 (Geneva, 1979), and 47 U.S.C. § 153(q).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

South Central Bell Telephone
Company and Southern Bell
Telephone and Telegraph Company

Plan for Comparably Efficient
Interconnection of Enhanced
Service Providers

ORDER

Adopted: May 13, 1988; Released: May 16, 1988

By the Chief, Common Carrier Bureau:

1. Before us is a Motion for Extension of Time that BellSouth Corporation's two operating companies, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth), filed on May 12, 1988. BellSouth requests an extension of the time for filing reply comments in this proceeding, in which we are evaluating BellSouth's Comparably Efficient Interconnection (CEI) plan for voice messaging services (the Plan).[1] Reply comments are presently due on May 16, 1988. BellSouth requests that we extend the time for filing reply comments to May 26, 1988.

2. In its motion, BellSouth notes that a number of parties submitted comments opposing the Plan on the ground that BellSouth did not include rates or other pricing information for tariffed services that the company intends to use in providing voice messaging services. Those parties, says BellSouth, claim that tariff pricing information is necessary to substantiate BellSouth's contention that tariff shopping opportunities will arise unless customer and use restrictions are included in the tariffs.[2]

3. BellSouth states that it does not read the Commission's orders as requiring rate information in CEI plans for services that will be tariffed at the state level but that, in order to respond to the arguments of commenters, it is preparing demonstrations of tariff shopping opportunities that justify customer and use restrictions. BellSouth says that it needs additional time to develop those demonstrations. It argues that no party other than itself will be injured by the delay, noting that a number of commenting parties have advocated much longer delays -- until after the Commission has reviewed BellSouth's Open Network Architecture plan -- before approving this or any other of its CEI plans.[3]

4. We grant BellSouth's motion in part. While it is the policy of the Commission that extensions of time shall not be routinely granted,[4] we acknowledge that the public would be served by the development of a complete record in this proceeding, particularly on the issues that BellSouth mentions in its motion. BellSouth has made a reasonable case that more time would be useful to develop fully its reply comments on these issues. Therefore, we extend the filing date for reply comments to May 23, 1988.

5. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291, that the motion of BellSouth described in paragraph 1 is GRANTED as modified. Reply comments are due on May 23, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Pleading Cycle Established for Comments on BellSouth's Comparably Efficient Interconnection Plan for Voice Message Service, Public Notice, DA 88-426, released March 28, 1988.

[2] BellSouth Motion for Extension of Time at 2.

[3] *Id.* at 3.

[4] Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46 (a) (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-180

In the Matter of

Southwestern Bell
Telephone Company

Transmittal Nos. 1537 and 1560
Revisions to Tariff F.C.C. No. 68

ERRATUM

Released: May 24, 1988

By the Chief, Common Carrier Bureau:

1. The Order Designating Issues for Investigation adopted by this Bureau in the above-captioned proceeding,[1] contains material that is hereby corrected as indicated in the following paragraph.

2. The first sentence of Paragraph 7 is revised by inserting "not" before "to investigate a new tariff transmittal."

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Southwestern Bell Telephone Company, Order Designating Issues for Investigation, DA 88-480, released Apr. 22, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New York Telephone Company Tariff F.C.C. No. 41 — Transmittal No. 884

New England Telephone and Telegraph Company Tariff F.C.C. No. 40 — Transmittal No. 907

Petitions for Expedited Waiver of Section 69.4(b) and Subparts B and C of Part 69 of the Commission's Rules

ORDER

Adopted: March 7, 1988; Released: March 9, 1988

By the Deputy Chief, Common Carrier Bureau:

1. The New York Telephone Company (NYT) and the New England Telephone and Telegraph Company (NET), collectively the NYNEX Telephone Companies (NYNEX), filed the above-referenced transmittals on January 21, 1988, and January 29, 1988, respectively. By these revisions, NYNEX proposes to introduce 900 Access Service for all interexchange carriers (ICs), and to revise the rate structure and rate level of the non-recurring charges (NRCs) associated with 800 Access Service NXX code changes. NYNEX accompanied the transmittals with petitions for waiver of Part 69, Subparts B and C, and Section 69.4(b) of the Commission's Rules, 47 C.F.R. Part 69, Subparts B and C and § 69.4(b), to allow the establishment of separate rate elements for the recovery of certain NRCs incurred in providing 900 Access Service.[1] The NYT revisions are scheduled to become effective on March 11, 1988; the NET revisions are scheduled to become effective on March 14, 1988.

2. MCI Telecommunications Corporation (MCI) filed petitions to suspend and investigate both the NYT and NET revisions,[2] while ALC Communications Corporation (ALC) filed a petition to investigate both tariffs. [3] VTA, Inc. (VTA) filed a petition to reject or suspend and investigate the NYT tariff,[4] and Telesphere International, Inc. (Telesphere) filed a reply to the petitions against the NYT tariff.[5] NYNEX filed replies to the petitions against both tariffs.[6]

3. MCI argues that NYNEX has inflated the costs underlying the 900-NXX Service Establishment charge. MCI Petition I at 2-3. MCI also challenges the demand count of "one" which was used in developing charges for Subsequent Orders and Additional NXX Codes per LATA. *Id.* at 4. Additionally, MCI argues that the 800 Access Service rate structure and rate level changes proposed by NYNEX represent rate increases which seek double recovery of 800 Service Establishment costs. *Id.* at 7. Finally, MCI contends that since NYNEX has failed to provide cost support detail to support its proposed 800-NXX NRCs, it is impossible to determine if the charges are reasonable. *Id.* at 8.

4. ALC, on behalf of its long distance subsidiary, Allnet, argues that NYNEX should apply one NRC for customers with direct end office connections, and one for those with tandem connections. ALC Petition at 2-4. ALC maintains that unless there are two charges, smaller ICs, which usually take service through access tandems, will pay a disproportionate amount for the costs of installing 900-NXX and 800-NXX Service. *Id.* at 1.

5. VTA contends that charges for initiation of 900 Access Service should be applied on a per NXX code basis rather than on a per customer basis. VTA Petition at 12. VTA also argues that NYT has understated the demand for its 900 Access Service and, as a result, the proposed rates are excessive. *Id.* at 15-18. Additionally, VTA objects to the timing and manner of NYT's offering. VTA asserts that NYNEX and NYT violated their duty to provide timely and accurate information to ICs regarding access service plans by withholding information from VTA concerning the service "roll-out" date. *Id.* at 7-12.

6. NYNEX replies that it is not cost effective for its rates to differentiate between carriers which take service through tandems and those with direct end office connections. NYNEX Reply I at 3. Moreover, NYNEX contends that its rate structure, based on customer-driven costs for its Service Establishment charge, and NXX-driven costs for Subsequent Orders and Additional NXX Codes, is equitable. *Id.* at 7-8. NYNEX also contends that it was reasonable to consider all of the start-up costs, plus the costs to install service for later customers, in the development of the Service Establishment charge for 900 Service. *Id.* at 5. Additionally, NYNEX argues that its assumption of a demand factor of "one" in developing rates for Subsequent Orders and Additional NXX Codes is consistent with the per unit development of costs. *Id.* at 5-6. NYNEX contends that although NYT did not understate demand, any errors are unlikely to affect proposed charges because the total level of costs and revenues involved is small. *Id.* at 8. NYNEX further submits that MCI has failed to realize that, since the proposed 800 Access Service charges are applied on a per LATA basis, customers will experience a rate decrease, not increase. *Id.* at 6. Finally, NYNEX asserts that VTA was in fact apprised of the service roll-out schedule for the NYT tariff, and moreover, that VTA cites no precedent for suspending or rejecting the NYT revisions because of the manner in which VTA received notice of the filing. *Id.* at 10.

7. The Common Carrier Bureau has reviewed NYNEX's transmittals, the petitions, and NYNEX's replies. We conclude that no compelling argument has been presented that the proposed tariff revisions are so patently unlawful as to require rejection, and that an investigation of the revisions is not warranted at this time.[7] We further conclude that in view of NYNEX's compliance with the separations methodology set forth in the *Interim 800 Access Order*, NYNEX's waiver petitions should be granted.

8. IT IS THEREFORE ORDERED that the petitions for waiver filed by the the New York Telephone Company and the New England Telephone and Telegraph Company ARE GRANTED.

9. IT IS FURTHER ORDERED that the petitions against New York Telephone Company, Tariff F.C.C. No. 41, Transmittal No. 884, and New England Telephone and

Telegraph Company, Tariff F.C.C. No. 40, Transmittal No. 907, filed by MCI Telecommunications Corporation, ALC Communications Corporation, and VTA, Inc., ARE DENIED.

10. IT IS FURTHER ORDERED that the pleading filed by Telesphere International, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] NYNEX explains that in developing the rates for 900 Access Service, it applied the separations principles prescribed by the Commission in Interim 800 Exchange Access Tariffs, CC Docket No. 86-279, Memorandum Opinion and Order, FCC 87-291, 2 FCC Rcd 5905 (1987) (*Interim 800 Access Order*). In that Order, the Commission directed, *inter alia*, that interim 800 Access Service costs be allocated on the basis of billed equal access minutes. *Interim 800 Access Order*, 2 FCC Rcd at 5909. This separations methodology applies to 900 Access Service as well. *See* Ameritech Tariff F.C.C. No. 2, Petition for Expedited Waiver, Transmittal No. 87, Order, 2 FCC Rcd 4217 (1987).

[2] MCI Petition To Suspend and Investigate NYT Tariff, filed Feb. 8, 1988 (MCI Petition I); MCI Petition To Suspend and Investigate NET Tariff, filed Feb. 16, 1988 (MCI Petition II). Since MCI's petitions are virtually identical, we refer only to MCI Petition I.

[3] ALC Petition To Investigate, filed Feb. 8, 1988 (ALC Petition).

[4] VTA Petition To Reject or Suspend and Investigate, filed Feb. 8, 1988 (VTA Petition).

[5] Telesphere's pleading was styled as a reply to the petitions of ALC, VTA, and MCI Petition I. However, since Section 1.773(b) of the Commission's Rules, 47 C.F.R. § 1.773(b), contemplates that only publishing carriers may file replies, we dismiss Telesphere's pleading.

[6] Reply of the NYNEX Companies to ALC Petition, VTA Petition, and MCI Petition I, filed Feb. 18, 1988 (NYNEX Reply I); Reply of the NYNEX Companies to MCI Petition II, filed Feb. 22, 1988 (NYNEX Reply II). Since all of the arguments in NYNEX Reply II are also included in NYNEX Reply I, we refer only to NYNEX Reply I.

[7] We note that VTA's argument regarding NYT's marketing of its 900 Service is more in the nature of a complaint against NYNEX's marketing practices than an argument against the tariff itself. Accordingly, since the tariff review process is not the proper forum for consideration of this argument, VTA may wish to seek relief by filing a complaint pursuant to Section 208 of the Communications Act, 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL GATEWAY TELECOM, INC. File No. I-T-C-88-047

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate circuitry to provide direct service between the United States and Panama.

NATIONAL GATEWAY TELECOM, INC. File No. CSG-88-012-ML

For modification of license for a domestic fixed satellite earth station (E860812) at Andrews AFB, Maryland, for the provision of private line service to and from Corozol, Panama, via the Aurora I domestic satellite.

ORDER AND AUTHORIZATION

Adopted: May 6, 1988; Released: May 9, 1988

By the Chief, International Facilities Division:

1. The Commission has under consideration the above captioned applications of National Gateway Telecom, Inc. (NGT) for authority under Section 214 and Title III of the Communications Act of 1934, as amended, to acquire and operate one T-1 digital satellite circuit, with the connecting circuitry, in order to provide two-way service between the United States and Panama. The application was placed on the Commission's public notice December 16, 1987.[1] The Department of Defense (DoD) submitted a Statement in Support and Pan American Satellite filed comments in response to the application.[2]

2. NGT is a non-dominant common carrier. In its application, NGT seeks authority to acquire and operate one T-1 digital satellite circuit in order to provide direct two-way private line service between Fort Belvoir, Virginia, via NGT domestic satellite earth station (E860812) at Andrews AFB, Maryland, and an NGT earth station to be located at Corozol, Panama, via the Aurora I domestic satellite. NGT states that the services and facilities would be provided in accordance with the terms of its contract with the Department of Defense.

3. According to DoD, it originally requested bids for service between the United States and Panama which employed alternatively both INTLESAT and DOMSAT facilities. It subsequently identified a new classified service requirement which, for national security purposes, could not be satisfied over INTELSAT facilities. NGT was then awarded the contract based on national security, economic and technical capability criteria. DoD states that the classified nature of the service requirements make it necessary to utilize a diverse commercial route provided by a U.S. carrier that owns, controls and maintains the satellite. Additionally, it requires the earth station terminals to be owned, operated and maintained by U.S. nationals who possess a collateral top secret security clearance. DoD claims that INTELSAT cannot meet these requirements because of foreign ownership and control of the space segment. DoD has determined that the leased satellite communications system to be provide by NGT is required solely for national security purposes.

DISCUSSION

4. In 1981, following consultations with the Department of State, the Commission gave initial approval to the use of U.S. domestic satellites for the transmission of certain international telecommunications services to points within the footprint of those satellites. [3] Under the Commission's Transborder Satellite policy, domestic satellites may be used for these services where INTELSAT is incapable of providing a service or where it would be clearly uneconomical or impractical to use the INTELSAT system for that service. From DoD's statement it is clear that INTELSAT is not capable of providing the secure link it needs for this two-way service to Panama in a manner consistent with DoD's national security requirements. Consequently, we conclude that NGT has met the first part of our transborder criteria.

5. Typically, before the Commission will grant final authority for the provision of transborder service, the proposed service must be consulted with INTELSAT in accordance with terms of Article XIV(d) of the INTELSAT Agreement. However, under Article XIV(g) of the Agreement, no such consultation is necessary where the communications to be provided are required for soley national security purposes.[4] DoD has certified that the acquisition of and use of non-INTELSAT space segment is necessary to satisfy national security requirements. The Department of State has informed the Commission that it has no objection to grant of the application.[5]

6. Accordingly, IT IS ORDERED that the amended applications of National Gateway Telecom ARE GRANTED and National Gateway Telecom is authorized to acquire and operate one T-1 digital satellite circuit between the United States and Panama via the Aurora I satellite (KS45) and National Gateway earth station facilites at Andrews (AFB), Maryland and Corozal Panama, together with connecting facilities.

7. IT IS FURTHER ORDERED that use of the facilities authorized herein is limited to the provision of those services which are necessary to satisfy national security requirements as specified by DoD.

8. This order is issued under Section 0.291 of the Commission's Rules on Delegations of Authority and is subject to review under Section 1.115 of the Rules on Practice and Procedure. Review by the full Commission may be requested within 30 days of the public notice of this order (*See* Commission Rule 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The application was amended January 14, 1988.

[2] PAS does not object to the grant of NGT's applications. It takes exception, however, to a statement in application File No. I-T-C-88-047 implying that separate system operators such as PAS would not be eligible to provide the proposed services.

[3] *See* , *e. g.*, Transborder Satellite Video Services, 88 FCC 2d 258 (1981); American Satellite Co., 88 FCC 2d 178 (1981); and Satellite Business Systems, 88 FCC 2d 195 (1981).

[4] Article XIV(g) of the INTELSAT Agreement states, "This Agreement shall not apply to the establishment, acquisition or utilization of space segment facilites separate from INTELSAT space segment facilities soley for national security purposes."

[5] *See* Letter from Randolph C. Earnest, Director, Regulatory and Treaty Affairs, Department of State, to Wendell R. Harris, Assistant Bureau Chief, International, Common Carrier Bureau dated May 5, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-240

In re Applications of:

ALBERT E. GARY (hereafter Gary)	File No. BPH-851029MH
KILLINGTON BROADCASTING, LTD. (hereafter Killington Broadcasting)	File No. BPH-851030MN
KILLINGTON COMMUNITY BROADCASTING CORPORATION (hereafter Killington Community)	File No. BPH-851030MO
MOUNTAIN BROADCASTING LIMITED PARTNERS (hereafter Mountain)	File No. BPH-851030MP
ELF BROADCASTING COMPANY (hereafter Elf)	File No. BPH-851030MQ
RADIO GROUP,INC. (hereafter Radio Group)	File No. BPH-851030MR
BRUCE LYONS (hereafter Lyons)	File No. BPH-851030MX
KILLINGTON, LTD. (hereafter Limited)	File No. BPH-851030MZ

For a Construction Permit for a
New FM Station on Channel 287C2
in Killington, Vermont

HEARING DESIGNATION ORDER

Adopted: May 4, 1988 **Released: May 24, 1988**

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Killington Broadcasting and Elf.* Both Killington Broadcasting and Elf filed an application indicating that their organizational structures are limited partnerships. Killington Broadcasting stated that the limited partner, Mr. Walter J. Sezudlo, holds 80% of the partnership equity; however, it failed to provide relevant details of the limited partnership agreement. In its application Elf identified the limited partners, Elio Betty, Jr. and Hugo S. Puglia, and the general partner, Gary Elfstrom, and specified the respective percentages of ownership equity held by each of the three principals, but it did not provide relevant details of the limited partnership agreement. In *Attribution of Ownership Interest*, 97 FCC 2d 997(1984), *recon. granted in part* 58 RR 2d 604(1985), the Commission stated that the limited partnership interests were not attributable for the purposes of the multiple ownership rules if the applicant certified that the limited partners will "not be involved in any material respect in the management or operation of" the proposed station. *Attribution*, at 1023. The Commission defined the requisite degree of non-involvement in paragraphs 48-50 of the reconsideration. Further, the Commission directed that Form 301, among others, be amended to conform to the new attribution standards. *Attribution*, at 1024. Accordingly, there is no need for Killington Broadcasting and Elf to provide information as to the limited partners if they can submit the necessary certification and show that limited partnership interests will be sold only to individuals or entities that are sufficienty insulated. If the certifications and showings are not appropriate, the necessary information as to each limited partner will have to be filed as an amendment. Finally, since the Commission retained the cross interest policy as to other attributable media interests in the same area (*Attribution*, at 1030), Killington Broadcasting and Elf will be required to state whether the limited partners have or could have other media interests subject to the cross-interest policy and identify the limited partner(s) with any such interests, identify the other local media, and state the nature or extent of the ownership interest.

3. *Killington Community.* In response to Item 6(a) of Section II, Form 301, Killington Community stated in Exhibit 1 that its President- Treasurer, Edward H. Stokes, owns both 100% of Killington Community's voting stock and 100% of the Stokes Communications Corporation (SCC), the licensee of AM and FM broadcast stations WCVR, Randolph, Vermont. Killington Community indicates that Mr. Stokes' wife, Margaret W. Stokes, is Vice President/Secretary of Killington Community and that Mr. Stokes' stock ownership in SSC is held in joint tenancy with Mrs. Stokes. Mr. and Mrs. Stokes also state that they will divest their interest in the AM/FM station if their application for the new FM station in Killington is granted. This commitment is reflected in an appropriate ordering clause.

4. *Mountain.* Mountain has proposed to locate at a site used by two FM stations on an existing tower. However, if this is not possible Mountain proposes to erect a new 30 foot structure near the existing tower to facilitate the new antenna. The staff cannot confidently and reliably verify

that parameters such as height of antenna radiation center above ground, height of radiation center above mean sea level, and overall tower height above ground will be consistent with the data provided in the application should Mountain construct a second tower instead of sharing its antenna with WRUT(FM) and WJJR(FM). Therefore, Mountain must specify which course of action it intends to pursue within 30 days of the release of this Order. In addition, an air hazard issue will be specified.

5. *Radio Group*. Radio Group indicated that its proposed operation will require the hiring of a staff of more than five persons. Accordingly, pursuant to 47 C.F.R. § 73.2080(c), it submitted a Model Equal Employment Opportunity Program. However, it has not filled out completely certain essential sections of its program. Specifically, it has failed to state the names of any publications in which it plans to place advertisements for the purpose of recruiting; failed to identify any employment referral services which refer job candidates; failed to identify specifically any high school or college with significant minority and female enrollments; and failed to state the nature of the assistance it will provide to students, schools, or colleges in order to enable women and minorities to compete in the broadcast market on an equitable basis. Based on these omissions, we find that Radio Group has not complied with the requirements of the stated rule. Accordingly, an appropriate amendment will be required.

6. *Other Matters*. On April 11, 1986, Gary filed a petition to deny against the following four applicants: Killington Broadcasting, Killington Community, Mountain, and Radio Group. Each of the four petitions makes three identical contentions against those applicants. Each such contention is treated in turn below.

7. Gary's first contention is that the transmitter site maps submitted by the cited applicants in response to section V-B, Item 10 (a) of Form 301, have been "reduced in contravention of paragraphs 1 and 2 of the *Public Notice*, FCC CLARIFIES TRANSMITTER SITE MAP REQUIREMENTS, April 5, 1985 (hereafter "Public Notice)." Staff review indicates that none of the applicants' transmitter site maps have been reduced in size below the scale required by Commission standards. Accordingly, Gary's petitions will be denied with respect to this contention.

8. Gary's second contention is that each of the cited applicants' transmitter site maps "do not show the USGS margin markings on at least two margins of the 7.5 series map in contravention with the *Public Notice*. " Paragraph 2 of the *Public Notice* requires that applicants provide a "7.5 series U.S Geographical Survey topographic quadrangle map upon which is marked the transmitter site". Paragraph 3 requires that the 7.5 minute map be full scale and show along the printed margins of both axes at least two coordinate markings, specifically labeled by the USGS, one on either side of the marked site. Staff review indicates that the transmitter site maps submitted by Killington Broadcasting, Radio Group and Mountain comply fully with these requirements. Paragraph 4 of the *Public Notice* states "In certain cases it may be inconvenient to provide a full scale photo copy which includes both the site and margins." Paragraph 4 requires that a full scale copy of the section of the map containing the site be submitted. This must include one margin and two standard printed crossmarks; in addition a reduced copy of the entire map must be included. Staff review indicates that the transmitter site map submitted by Killington Community complies fully with these requirements. Accordingly, Gary's petitions will be denied with respect to this contention.

9. Gary's remaining contention is that each of the cited applicants' signal contour coverage map does not show the community of license clearly, as required by FCC Form 301 Section V-B, Item 10 (c) and by the *Public Notice* of May 16, 1985, paragraph 4 (g).[1] Staff review indicates that each applicant's depiction of its respective community of license on its contour map is of sufficent clarity and legibility to determine the proposed community of license. Furthermore, from the submitted maps the staff is able to establish compliance with the requirement that each applicants' 3.16 mV/m contour covers at least 80% of the community of license.[2] *See* 47 C.F.R. § 73.315 (a). Since none of the applicants are in violation of either the community of license identification requirement or the contour coverage rule, Gary's petitions will be denied with respect to this contention, as well.

10. The same April 11, 1986 Petition to Deny filed against Killington Community contained two additional arguments. Gary contends first, that "The coverage map, identified as Figure 5, was not supplied by the contract duplicator, presumably, that map is missing from the application (sic) "; and second, that the average terrain data used by Killington Community was (allegedly) "retrieved from Commission files for one of the existing facilities; that the average terrain calculations performed by using the NDGC terrain data base shows substantial deviation from that data that is on file (sic); and that the used (sic) of FCC file data resulted in faulty data, and, therefore, the application should be returned as unacceptable for filing."

11. Both of these contentions are unfounded. First, a search of Commission files indicated that the original and required copies of the coverage map were submitted by Killington Community with its application. Thus, any difficulty which Gary has had in obtaining a copy of that map has not been a result either of the applicant's failure to provide the map, or of its unavailability to the Commission's document duplication contractor. Second, calculations performed by Commission staff indicated that the data contained in Killington Community's Figure 4, "Tabulation of Average Elevations and Distances to Coverage Contours", contain HAAT data (Antenna Height Above Average Terrain) and AMSL data (Antenna Height Above Mean Sea Level) which fully comply with the Commission's standards of accuracy. Since the Commission is able to independently confirm the accuracy of Killington Community's calculations, there are no grounds to assume that the calculations were based on faulty data. Moreover, Gary has produced no specific evidence that Killington Community's data was faulty or that it was illegally or improperly obtained. The petition will be denied with respect to these additional contentions as well. Accordingly, for the above stated reasons, the petitions to deny filed by Gary against the four applicants will be denied.

12. Engineering study of the applications of Gary, Killington Broadcasting, Killington Community, Mountain, Elf, Radio Group, and Limited has revealed noncompliance with ANSI C95.1-1982 guidelines for human exposure to radio frequency radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned in this instance that the cited applicants may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in Docket No

79- 163, 51 Fed. Reg. 14999 (1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the applicant is subject to environmental processing under the Section 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. Section 1.1307 (b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of radio frequency radiation exceeding specific standards. Since applicants' proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, they are required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, each of the cited applicants will be required to file within 30 days of this Order an Environmental Assessment to the presiding Administrative Law Judge. [3] In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phrase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom* ; *Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

13. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENTS FILED
Killington Broadcasting	March 17, 1988 (Engineering)
Mountain	January 5, 1988; October 26, 1987
Limited	November 24, 1987

14. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1939, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To deterimine whether there is a reasonable possibility that the tower height and location proposed by Mountain would constitute a hazard to air navigation.

2. If a final environmental impact statement is issued with respect to Gary, Killington Broadcasting, Killington Community, Mountain, Elf, Radio Group, and Limited, in which it is concluded that the proposed facilities of one or more of those applicants is likely to have an adverse effect on the quality of the environment, to determine whether the proposal of any such applicant is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That Killington Broadcasting and Elf shall file, within 30 days of the release of this Order, an amendment with the Administrative Law Judge which will provide, for all limited partners, an insulation statement wholly satisfying the multiple ownership and cross- interest policy requirements of the Commission's *Attribution Reconsideration Order*, 58 RR 2d 604 (1985).

18. IT IS FURTHER ORDERED, That in the event of the grant of its application, Edward and Margaret Stokes, principals of Killington Community, must divest themselves of any interest in and sever all connection with AM and FM broadcast stations WCVR, Randolph, Vermont, prior to the commencement of program test authority.

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Mountain must submit an amendment to the Administrative Law Judge clarifying the inconsistency in its application regarding its proposed antenna.

20. IT IS FURTHER ORDERED, That the FAA is made a party to this proceeding with respect to the air hazard issue only.

21. IT IS FURTHER ORDERED, That Radio Group shall file the appropriate amendment to its EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

22. IT IS FURTHER ORDERED, That the petitions to deny filed on April 11, 1986 by Gary against Killington Broadcasting, Killington Community, Mountain, and Radio Group ARE DENIED.

23. IT IS FURTHER ORDERED, That in accordance with paragraph 12 above, Gary, Killington Broadcasting, Killington Community, Mountain, Elf, Radio Group and Killington Limited shall submit an Environmental Assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

24. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Killington Broadcasting: March 17, 1988; Mountain: January 5, 1988, October 26, 1987; Limited: November 24, 1987.

25. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M street, N.W., Washington, D.C. 20554.

26. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein, shall, pursuant to Section 1.221 (c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, or no later than **June 14, 1988,** file with Commisssion, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

27. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934 as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594 (g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The "paragraph 4(g)" cited is contained in Appendix D of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985) (hereafter "Appendix D). Paragraph 4 (g) of that Appendix requires that the map or maps provided in response to Section V-B, Item 10(c) must "clearly and legibly" show the proposed 60 and 70 dBu contours and the legal boundaries of the communityof license.

[2] *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT)

[3] This study must also include calculations of exposure levels measured at the base of the tower which account for the cumulative effect of the proposed facilities in conjunction with all other broadcast facilities and construction permits sharing the proposed tower.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CONTEL CELLULAR OF RICHMOND, INC. — File No. 00435-CL-MP-88

For authority to modify and combine the Richmond, Virginia and Petersburg-Colonial Heights-Hopewell, Virginia CGSAs

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 1988; Released: May 24, 1988

By the Chief, Mobile Services Division:

1. Contel Cellular of Richmond, Inc. (Contel) proposes to combine the Richmond, Virginia Cellular Geographic Service Area (CGSA) and the Petersburg-Colonial Heights-Hopewell, Virginia CSGA and to expand the Chester, Virginia cell, which is now part of the Richmond cellular system. Contel observes that the proposed change at the Chester site will improve service and coverage to the portion of the Richmond system which contains Interstate 95, which is the major north-south thoroughfare in the Richmond area. Contel also asserts that the consolidation of the Richmond and Petersburg systems will permit travellers along major interstate routes southward from Richmond to have continuous cellular coverage. An affiliate of Contel is the licensee of the consolidated Newport News-Norfolk, Virginia system. Contel asserts that it has effectuated full frequency coordination so that there will be no possibility of interference, but rather, an improvement in service to customers on both the proposed consolidated system and the Newport News- Norfolk system. Contel also claims that by consolidating the Petersburg and Richmond CGSAs, Contel will be spared the cost of building a separate switch to handle Petersburg traffic, which should result in lower cost service in the consolidated CGSA. Petersburg Cellular Telephone Company (Petersburg Cellular) has filed comments requesting that Contel's application be dismissed or denied. Contel has filed an opposition to Contel's comments.

2. Petersburg Cellular argues that Contel's proposal would either create or exacerbate a competitive disparity between itself and Contel in the State of Virginia. Petersburg Cellular notes that the applicant herein is a wholly-owned subsidiary of Contel Cellular, Inc., which is a wholly-owned subsidiary of the Contel Corporation, and that corporations controlled by the Contel Corporation serve the Richmond, Petersburg, Norfolk-Virginia Beach-Portsmouth, Newport News-Hampton, and Roanoke, Virginia markets. Petersburg Cellular asserts that it provides service to only one market, namely, Petersburg. In light of the facts that Contel Corporation serves five markets in Virginia, whereas Petersburg Cellular only serves one market in Virginia, Petersburg Cellular asserts that Contel has a massive competitive advantage over all of the non-wireline competitors in its area of operation, including Petersburg Cellular. Assuming that Contel would have a "megasystem" in eastern Virginia even if the Commission should refuse to allow consolidation of the Richmond and Petersburg CGSAs, Petersburg Cellular contends that the Commission's policies encouraging competition betweeen wireline and non- wireline cellular licensees would not be served by permitting the requested consolidation. Further, Petersburg Cellular argues that consolidation of the Richmond and Petersburg CGSAs is not necessary to spare Contel the cost of building a separate switch to handle Petersburg traffic, noting that the Commission has permitted the licensee of one MSA to share the switch of a licensee in an adjoining MSA without consolidation.

3. Petersburg Cellular has failed to present sufficient reasons to justify the dismissal or denial of Contel's application. Contel's proposed consolidation of its existing Richmond and Petersburg cellular systems would not violate any of the Commission's cellular rules or policies. As Petersburg Cellular notes, the Commission created a dual allocation system (wireline and non-wireline) for each cellular market in order to encourage competition,[1] and created a "headstart doctrine" to allow non-wireline carriers to demonstrate that the public interest would be harmed in particular instances if wireline carriers were allowed to provide service prior to non-wireline carriers.[2] Although the Commission attempted to create a market structure that would encourage competition between wireline and non-wireline carriers, it did not create barriers to prevent wireline (or non-wireline) carriers from consolidating their CGSAs in order to facilitate the provision of improved or expanded service to the public. *See , e. g., Austin Cellular Telephone Company and San Antonio Cellular Telephone*, 2 FCC Rcd 6768 (1987). We conclude that Contel's proposed consolidation of its Richmond and Petersburg CGSAs will serve the public interest by facilitating the provision of improved service to the public. We also observe that Petersburg Cellular can request Commission permission to consolidate its CGSA with those of its neighboring non-wireline licensees in the Richmond and/or Newport News and/or Norfolk MSAs if it wishes to accomplish the same goals that Contel seeks through its proposed consolidation application.

4. We find that Contel is fully qualified to effectuate the proposals in the instant application and that granting its application will serve the public interest, convenience and necessity.

5. Accordingly, IT IS ORDERED, that the application (File No. 00435- CL-MP-88) filed by Contel Cellular of Richmond, Inc. IS GRANTED.

6. IT IS FURTHER ORDERED, that the comments filed by Petersburg Cellular Telephone Company, Inc. ARE DENIED.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *Cellular Communications Systems,* 86 F.C.C.2d 469, 488 (1981).

[2] Id., at 491, n.57

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-279

In the Matter of

Amendment of Section 73.606(b),	RM-5823
Table of Allotments,	
TV Broadcast Stations.	
(Lewisburg, West Virginia)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 18, 1988; Released: May 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Sid Shumate (petitioner), the Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 4610 (1987), proposing the allotment of UHF Television Channel 59- to Lewisburg, West Virginia, as that community's first local commercial television service. Petitioner filed supporting comments reaffirming his intention to apply for the channel.

2. Lewisburg (population 3,065)[1] seat of Greenbrier County (population 37,665) is located in southeastern West Virginia approximately 80 kilometers (50 miles) northwest of Roanoke, Virginia.

3. In view of the aforementioned, we find that the public interest can be served by the allotment of Channel 59- to Lewisburg, as that community's first commercial television service. The allotment can be made in compliance with the mileage separation requirements of Sections 73.610 and 73.698 of the Commission's Rules with a site restriction of 12.2 kilometers (7.6 miles) northwest of the community to avoid short spacings to a construction permit for Station WZZW, Channel 60, Roanoke, Virginia.

4. Although the Commission recently imposed a freeze on television allotments, or applications therefor, in certain metropolitan areas,[2] Lewisburg is not affected as this proposal is not within the prohibited co-channel distance to any the specified areas. [3]

5. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 24, 1988,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Lewisburg, West Virginia	59-

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. Questions related to the application process should be addressed to Video Services Division, Television Branch, Mass Media Bureau, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Population figures were taken from the 1980 U.S. Census.

[2] *See Order*, 52 FR 28346, July 29, 1987, freezing the filing of construction permit applications for vacant UHF television channels in affected metropolitan areas.

[3] *See* Section 73.610 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-283

In the Matter of

Amendment of Section 73.202(b), RM-5684
Table of Allotments,
FM Broadcast Stations.
(Holyoke, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 18, 1988; Released: May 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 4619 (1987), issued in response to a petition filed by Virginia K. Cutforth (petitioner), proposing the allotment of FM Channel 222C2 to Holyoke, Colorado, as that community's first local broadcast service. Supporting comments were filed by petitioner reaffirming her intention to apply for the channel, if allotted. No other comments were received.

2. As indicated in the *Notice*, Channel 222C2 can be allotted to Holyoke consistent with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules.[1]

3. In light of the above, we believe the public interest would be served by the instant proposal since it could provide a first local service to Holyoke. Therefore, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 8, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Holyoke, Colorado, as follows:

City	Channel No.
Holyoke, Colorado	222C2

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications on Channel 222C2 at Holoyke, Colorado, will open on **July 11, 1988,** and close on **August 10, 1988.**

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Compliance is based upon the utilization of center city reference coordinates at 40-35-00 and 102-18-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-509

In the Matter of

Amendment of Section 73.202(b), RM-6056
Table of Allotments,
FM Broadcast Stations.
(Lisbon, New Hampshire)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 18, 1988; Released: May 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Montpelier Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6917 (1987), proposing the allocation of Channel 244A to Lisbon, New Hampshire, as the community's first local FM service. Petitioner filed comments stating its intention to apply for the channel, if allocated. No other comments were received.

2. Channel 244A can be allocated to Lisbon in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence in the allotment has been received since Lisbon is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by allocating Channel 244A to Lisbon, New Hampshire, since an interest has been expressing in providing the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 8, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Lisbon, New Hampshire	244A

4. The window period for filing applications will open on **July 11, 1988,** and close on **August 10, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 44-12-48 and West Longitude 71-54-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-510

In the Matter of

Amendment of Section 73.202(b), RM-6057
Table of Allotments,
FM Broadcast Stations.
(Canton, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 18, 1988; Released: May 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Craig L. Fox (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6925 (1987), proposing the allocation of Channel 268A to Canton, New York, as the community's second local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted.[1] No other comments were received.

2. Channel 268A can be allocated to Canton in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.3 kilometers (4.5 miles) southeast to avoid a short-spacing to Station CHEQ-FM, Channel 266C1, Smiths Falls, Ontario, Canada, and to Station CBOF7F, Channel 271A, Brockville, Ontario, Canada.[2] Canadian concurrence in the allotment has been received since Canton is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by allocating Channel 268A to Canton, New York, since it could provide the community with its second local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 8, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Canton, New York	268A

4. The window period for filing applications will open on **July 11, 1988,** and close on **August 10, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's comments were not timely filed. However, they have been accepted for the purpose of expressing continuing interest.

[2] The coordinates for the allotment of Channel 268A to Canton are North Latitude 44-33-35 and West Longitude 75-05-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-259

In the Matter of

Amendment of Section 73.202(b), RM-5693
Table of Allotments,
FM Broadcast Stations.
(Steamboat Springs, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 18, 1988; Released: May 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers the *Notice of Proposed Rule Making* herein, 2 FCC Rcd 4454 (1987), issued in response to the request of Steamboat Springs Broadcasting, Inc.[1] (SSB), licensee of Station KSBT(FM) (Channel 244A), Steamboat Springs, Colorado, proposing the substitution of Channel 245C2 for Channel 244A and modification of its license accordingly to specify operation on the higher-powered channel. Supporting comments were filed by SSB reaffirming its interest in the proposal. Additionally, favorable comments were filed by Donald Pfau, *et al*, d/b/a Lord Broadcasting.[2] No other comments were received.

2. As indicated in the *Notice*, Channel 245C2 can be allotted to Steamboat Springs, Colorado at the petitioner's present site [3] consistent with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules.

3. We believe the public interest would benefit from the substitution of Channel 245C2 for Channel 244A at Steamboat Springs, Colorado, since it could provide an expanded broadcast service to the community and surrounding areas. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station KSBT(FM) to specify operation on Channel 245C2 in lieu of Channel 244A.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 8, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Steamboat Springs, Colorado, as follows:

City	Channel No.
Steamboat Springs, Colorado	245C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Steamboat Springs Broadcasting, Inc. for Station KSBT(FM), Steamboat Springs, Colorado, IS MODIFIED, effective **July 8, 1988,** to specify operation on Channel 245C2 in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] At the time the *Notice* was issued, KBCR, Inc., was the licensee of Station KSBT(FM). Subsequently, an application to assign the license to Steamboat Springs Broadcasting, Inc. (BALH-870826EB) was granted October 7, 1987.

[2] Lord, an applicant for Channel 243C at Evergreen, CO (BPH-821217AE), advises that adoption of the proposed modification herein will eliminate any conflict with its application which, it claims, is short-spaced to the present Class A operation of Station KSBT(FM).

[3] Reference coordinates at petitioner's present site are 40-27-43 and 106-51-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-416

In the Matter of

Amendment of Section 73.202(b),	RM-5770
Table of Allotments,	
FM Broadcast Stations.	
(Cannelton, Indiana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 18, 1988; Released: May 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 6236 (1987), issued in response to a petition filed by Martin L. Hensley (petitioner), proposing the allotment of Channel 275A to Cannelton, Indiana, as that community's first FM service. Supporting comments were filed by petitioner reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. As set forth in the *Notice*, Channel 275A can be allotted to Cannelton in conformity with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules, provided the transmitter therefor is sited in an area at least 10.9 kilometers (6.7 miles)[1] north of the community. Imposition of the site restriction will negate a short-spacing to pending applications for first adjacent Channel 274A at Beaver Dam, Kentucky.[2]

3. In view of the above, we believe the public interest would be served by the instant proposal since it could provide a first local FM service to Cannelton, Indiana.

4. Accordingly, pursuant to the authority set forth in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 8, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Cannelton, Indiana, as follows:

City	Channel No.
Cannelton, Indiana	275A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 275A at Cannelton, Indiana, will open on **July 11, 1988,** and close on **August 10, 1988.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Reference coordinates of the restricted site are 38-00-39 and 86-44-16.

[2] Channel 274A was allotted to Beaver Dam, Kentucky in MM Docket No. 84-231, and three applications are pending.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-200

In the Matter of

Amendment of Section 73.202(b),	RM-6124
Table of Allotments,	RM-6186
FM Broadcast Stations.	
(Dunn, Fuquay-Varina, Hope Mills, Topsail Beach, and Williamston, North Carolina)	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 14, 1988; Released: May 25, 1988

By the Chief, Policy and Rules Division:

1. The Commission has before it two mutually exclusive petitions for rule making. The first, filed by MECA Broadcasting, Inc. (MECA), requests the substitution of Channel 280C2 for Channel 280A at Fuquay-Varina, North Carolina, and the modification of its license for Station WAZZ to specify operation on the higher powered channel (RM-6124). In addition, in order to avoid a short-spacing between Channel 280C2 at Fuquay-Varina and the unused but applied for Channel 280A at Topsail Beach, North Carolina, MECA requests the substitution of Channel 279A for Channel 280A at Topsail Beach. Fuquay-Varina and Topsail Beach are approximately 144 kilometers apart but the Commission's Rules require a 163 kilometer separation between co-channel Class A and C2 allotments. MECA, which is also the licensee of Station WKKE at Williamston, North Carolina, states that the station would have to revert to Class C2 status which it would do by requesting recission of its construction permit specifying Class C1 facilities (BPH-851105IC). Williamston and Fuquay-Varina are located approximately 148 kilometers apart and the Commission's Rules require a 158 kilometer separation between first adjacent Class C1 and C2 allotments.

2. The second petition, filed by Landsman-Webster Communications of North Carolina, Inc. (Landsman), requests the substitution of Channel 278C2 for Channel 276A at Dunn, North Carolina, and the modification of its license for Station WKDS to specify the higher powered channel. In addition, Landsman requests the substitution of Channel 283A for unused but applied for Channel 278A at Hope Mills, North Carolina. Dunn and Hope Mills are located approximately 28 kilometers apart instead of the required 163 kilometer separation. Fuquay-Varina and Dunn are located approximately 45 kilometers apart but the Commission's Rules stipulate a 58 kilometer separation between second adjacent Class C2 allotments.

3. MECA states that if Station WAZZ is upgraded to Class C2 status, it would be able to serve an additional 339,592 persons within its 1 mV/m contour. It states that it is willing to accept Class C2 status at Williamston if Channel 280C2 is substituted at Fuquay-Varina, provided that the downgrade for Station WKKE does not become effective until the upgrade for Station WAZZ is effectuated. Further, MECA states that Channel 279A can be used at each of the sites specified by the five applicants for Channel 280A at Topsail Beach.

4. Landsman states that Channel 278C2 can be allocated to Dunn in compliance with the Commission's minimum distance separation requirements if Channel 283A is substituted for Channel 278A at Hope Mills, North Carolina. Landsman notes that there are four applications pending for use of Channel 278A at Hope Mills, but states that no change in site would be required for two of the applicants.[1] As to the remaining two applications, Landsman contends that these two applications may already be unacceptable for consideration since the sites specified are short-spaced to other licensed facilities. However, even if these applications are deemed acceptable, Landsman argues that this would not preclude favorable consideration of its request since the Commission has the authority to direct applicants to amend to non-short-spaced sites.

5. We believe that both proposals warrant further consideration since the allocation of a Class C2 allotment at either location could enable the only local Class A station to provide their respective community and surrounding area with a first wide coverage area FM service. However, in order to make a determination as to which of the two proposals should be selected, we request the proponents to further demonstrate why their community should receive the higher class allotment. In this regard, the parties should be guided by the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 F.C.C. 2d 88 (1982). In particular, both petitioners should submit a gain area showing indicating the population and square kilometers of the increased area to be served.

6. Channel 280C2 can be allocated to Fuquay-Varina in compliance with the Commission's minimum distance separation requirements with a site restriction of 23.3 kilometers (14.5 miles) southeast which will accommodate petitioner's desired transmitter location. Channel 279A can be allocated to Topsail Beach without the imposition of a site restriction and can be used at the sites specified by each of the five applicants. In addition, we note that Station WKKE at Williamston is currently licensed to operate on Channel 279C2 and that the mileage separation requirements to both Topsail Beach and Fuquay-Varina will be met if the station returns its construction permit for Channel 279C1. Alternatively, Channel 278C2 can be allocated to Dunn, North Carolina, with a site restriction of 29.3 kilometers (18.2 miles) south to avoid a short-spacing to the construction permit of Station WKKE, Channel 279C1, Williamston, North Carolina, and to Station WAZZ, Channel 280A, Fuquay-Varina. Channel 283A can be allocated to Hope Mills with a site restriction of 7.4 kilometers (4.6 miles) east to avoid a short-spacing to Stations WEZC, Channel 284C, Charlotte, North Carolina, and Station WDCG, Channel 286C, Durham, North Carolina, and can be used at the site specified in the application filed by James E. Carson (ARN-870819MJ).[2]

7. As requested, we shall also propose to alternatively modify the license of Station WAZZ, Fuquay-Varina, to specify Channel 280C2 or Station WDKS, Dunn, to Channel 278C2. In accordance with Section 1.420(g) of the Commission's Rules, modification of their licenses may be implemented without demonstrating the availability of an additional equivalent channel for use by other interested

parties and we shall not accept competing expressions of interest in the higher powered channels at either Fuquay-Varina or Dunn. The applicants for Channel 280A at Topsail Beach and Channel 278A at Hope Mills will be permitted to amend their applications to specify Channel 279A or Channel 283A, respectively, if allocated, and retain their cut-off protection since no upgrade in the class of channel is proposed.

8. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

City	Channel No. Present	Proposed
	OPTION I	
Fuquay-Varina, North Carolina	280A	280C2
Topsail Beach, North Carolina	280A	279A
Williamston, North Carolina	279C1	279C2
	OPTION II	
Dunn, North Carolina	276A	278C2
Hope Mills, North Carolina	278A	283A

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **July 15, 1988,** and reply comments on or before **August 1, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Morton L. Berfield, Esq.
Lewis I. Cohen, Esq.
Cohen & Berfield, P.C.
1129 20th Street, N.W.
Washington, D.C. 20036
(Counsel to MECA)

John Wells King
Haley, Bader & Potts
2000 M Street, N.W., Suite 600
Washington, D.C. 20036
(Counsel to Landsman)

11. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice of Proposed Rule Making* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED to the following applicants for Channel 280A at Topsail Beach, North Carolina; and Channel 278A at Hope Mills, North Carolina:

Topsail Beach FM Partnership
P.O. Box 3031
Topsail Beach, North Carolina 28445
(ARN-870812MA)

Group Three W, Inc.
P.O. Box 3303
Topsail Beach, North Carolina 28445
(ARN-870812MB)

Topsail Broadcasting,
A North Carolina General Partnership
1 South Topsail Drive, Box 2190
Surf City, North Carolina 28540
(ARN-870812MN)

Roy L. Jones
812 Robert E. Lee Drive
Wilmington, North Carolina 28403
(ARN-870812ML)

Jackson Lee Broadcasting Ltd. Partnership
131 South Anderson Blvd.
Topsail Beach, North Carolina 28445
(ARN-870812MO)

Winfas of Fayetteville,
A Limited Partnership
P.O. Box 59
Burlington, North Carolina 27216
(ARN-870819MF)

James E. Carson
1866 Geiberger Drive
Fayetteville, North Carolina 28303
(ARN-870819MJ)

Hope Mills Broadcasting Partnership
647 Edgehill Road
Fayetteville, North Carolina 28304
(ARN-870819MP)

Genesis Communications
1525 Morganton Road
Fayetteville, North Carolina 28305
(ARN-870819ML)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by

the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Our review of Landsman's proposal shows that the site specified by only one of the applicants, that of James E. Carson, ARN-870819MJ, can be used with Channel 283A.

[2] The coordinates for the proposed allotments are: Dunn, Channel 278C2, North Latitude 35-02-45 and West Longitude 78-35-30; Hope Mills, Channel 283A, 34-57-30 and 78-52-04; Fuquay-Varina, Channel 280C2, 35-27-10 and 78-36-00; Topsail Beach, Channel 279A, 34-22-01 and 77-37-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-199

In the Matter of

Amendment of Section 73.202(b), RM-6306
Table of Allotments,
FM Broadcast Stations.
(Fairbury, Nebraska)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 18, 1988; Released: May 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Siebert Communications, Inc. (petitioner), requesting the substitution of Channel 257C1 for Channel 257A at Fairbury, Nebraska, and the modification of its license for Station KUTT(FM) to specify the higher powered channel. Petitioner states that it will apply for the channel, if allocated. Channel 257C1 can be allocated to Fairbury in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. As requested, we shall also propose to modify petitioner's license for Station KUTT(FM) to specify operation on Channel 257C1. In accordance with Section 1.420(g) of the Commission's Rules, competing expressions of interest in use of the channel at Fairbury will not be accepted and the petitioner will not be required to demonstrate the availability of an additional equivalent channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 257C1 for Channel 257A at Fairbury, Nebraska, since it could provide the community and its environs with expanded radio service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Fairbury, Nebraska	257A	257B1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 15, 1988,** and reply comments on or before **Auagust 1, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Rick Siebert, President
Siebert Communications
414 Fourth Street
Fairbury, Nebraska 68352

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-08-18 and West Longitude 97-10-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-217

In the Matter of

Amendment of Section 73.202(b), RM-6169
Table of Allotments,
FM Broadcast Stations.
(Port St. Lucie, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 18, 1988; Released: May 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. St. Lucie Radio Corporation, licensee of AM Station WPSL, Port St. Lucie, Florida (petitioner), has filed a petition for rule making requesting the allotment of Channel 267A to Port St. Lucie, as its first FM channel. Petitioner furnished information in support of the proposal and stated its intention to apply for the channel, if allotted.

2. In view of the above, we believe that the proposal warrants consideration. A staff engineering study reveals that Channel 267A can be allotted to Port St. Lucie in conformity with the minimum distance separation requirements of Section 73.207(b) of the Rules. The transmitter site is restricted to 9.3 kilometers (5.8 miles) southeast of the city in order to avoid short spacing to Station WSTF(FM), Cocoa Beach, Florida. The coordinates for Channel 267A at this restricted site are 27-13-11 and 80-18-25.

3. Since the proposed allotment could provide a first FM service to Port St. Lucie, Florida, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Rules, with respect to that community as follows:

	Channel No.	
City	Present	Proposed
Port St. Lucie, Florida	—	267A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 15, 1988,** and reply comments on or before **August 1, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerrold Miller
Miller and Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-366

In the Matter of

Amendment of Section 73.202(b), RM-5746
Table of Allotments,
FM Broadcast Stations.
(Murray, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 18, 1988; Released: May 25, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission is the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5610 (1987), proposing the allotment of Channel 284A to Murray, Kentucky, at the request of West Kentucky Broadcasting Associates (petitioner).

2. The Commission did not receive comments from the petitioner (or any other interested parties), and consistent with our policy and procedures set forth in the Appendix to the *Notice*, we shall dismiss the request for lack of continuing interest.

3. In view of the foregoing, IT IS ORDERED, That the petition of West Kentucky Broadcasting Associates, to allot Channel 284A to Murray, Kentucky, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-246

In re Applications of

WABASH VALLEY COMMUNITY RADIO CORPORATION (hereafter Wabash)	File No. BPH-860611MD
WHITCAR REGIONAL BROADCASTING COMPANY, INC. (hereafter Whitcar)	File No. BPH-860702MG
JAMES R. BRICKER (hereafter Bricker)	File No. BPH-860707NN
Dennis J. Kelly, d/b/a CARROLL COUNTY BROADCASTING (hereafter Carroll)	File No. BPH-860707OF

For a construction Permit
for a New FM Station on
Channel 275A in Delphi, Indiana

HEARING DESIGNATION ORDER

Adopted: May 5, 1988; Released: May 25, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

6. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 15, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

7. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-247

In re Applications of

SOUTHLAND BROADCASTING COMPANY, INC.	File No. BPH-870709MG
Stephen G. McGowan *et al.* d/b/a BROADCAST ASSOCIATES (hereafter Associates)	File No. BPH-870710MG
DOTHAN RADIO JOINT VENTURE MIGNON C. SMITH AND ELLIS J. PARKER, GENERAL PARTNERS	File No. BPH-870710MH
Francis E. Busby d/b/a BEE BROADCASTING (hereafter Bee)	File No. BPH-870710NG
HOUSTON L. PEARCE (hereafter Pearce)	File No. BPH-870710NJ
ALBERT E. SMITH (hereafter Smith)	File No. BPH-870710NL
JERRY TOWNSEND	File No. BPH-870710NM

For Construction Permit
for a New FM Station
in Dothan, Alabama
Channel 273A (102.5 MHz)

HEARING DESIGNATION ORDER

Adopted: May 6, 1988; **Released: May 25, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Associates*. Principal Stephen G. McGowan is the owner of FM Station WORJ, a Class A facility serving Ozark, Alabama. Associates' proposed and WORJ's existing transmitters are approximately 19 miles apart, and there is 1 mV/m (60 dBU) contour overlap between the facilities, in violation of the "duopoly" provision of 47 C.F.R. § 73.3555(a)(2). Accordingly, an appropriate issue will be specified.

3. *Bee*. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and Bee have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Bee would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. The Commission requires that if there will be five or more fulltime employees, the applicant must complete and file Section VI of FCC Form 301, and supply a statement detailing hiring and promotion policies even though there may be only a few members of minorities residing within the proposed service area. Although Bee filed such a statement, it is deficient since it does not list clearly-defined minority and women's organizations that it proposes to utilize for the referral of minority and female job applicants. Accordingly, Bee will be required to amend its application to provide the information described above.

5. *Other matters*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after September 8, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE AMENDMENTS FILED
Associates	February 24, 1988
Pearce	February 12, 1988
Smith	February 4, 1988

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Associates, whether the common ownership of existing FM Station WORJ (Ozark, Alabama) and the proposed FM station is consistent with Section 73.3555 of the Commission's Rules and, if not, whether a grant of the application would be in the public interest.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Bee would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That Bee shall submit an amendment of its EEO information in accordance with the requirement of of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Associates, Pearce and Smith ARE GRANTED and the accompanying amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 15, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-248

In re Applications of

DAYSTAR RADIO, LTD. File No. BMP-861016AC
KLLV, Breen, Colorado

Has: 1560 kHz, 5 kW (0.5 kW-CH), D
Req: 550 kHz, 1.8 kW, D

FRANK ELWOOD AND WANDA JEAN ELWOOD File No. BP-870302AG
KCEM, Kirtland, New Mexico

Has: 1340 kHz, 1 kW, U (Aztec)
Req: 560 kHz, 0.5 kW, 3.5 kW-LS, DA-2, U (Kirtland)

For Construction Permit

HEARING DESIGNATION ORDER

Adopted: May 10, 1988 **Released: May 25, 1988**

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration: (i) the above-captioned mutually exclusive applications; (ii) a petition to dismiss the Frank Elwood and Wanda Jean Elwood (Elwood) application filed by Daystar Radio, Ltd. (Daystar); (iii) a petition to deny the Elwood application filed by the Aztec Main Street Association (Association); and (iv) related pleadings.

2. The petition filed by Daystar requests dismissal of the Elwood application, alleging 0.5 mV/m contour overlap between the KCEM proposed facility and AM radio station KGRT in Las Cruces, New Mexico. In response to this petition, and in accordance with Section 73.3522 of the Commission's Rules, Elwood filed an amendment dated July 16, 1987, reducing its proposed daytime power level to 3.5 kW and modifying its proposed daytime directional pattern, thereby eliminating the overlap between KCEM and KGRT.[1] Accordingly, Daystar's petition is hereby dismissed as moot.

3. The petition filed by the Association requests that the Elwood application be denied, alleging that a change in city of license from Aztec, New Mexico to Kirtland, New Mexico would leave Aztec without an AM radio station. Although Aztec would lose its only AM radio station, it would still have an FM radio station (KWYF) licensed to it, while Kirtland would gain its first radio station. Since a Section 307(b) issue is being specified as Issue 2, there is no need to resolve the Association's petition in this Order.

4. Elwood has failed to provide the correct tower height information and site photographs as required by Questions 6 and 12 respectively, of Section V-A, FCC Form 301 (August 1987 edition). These omissions must be corrected by an amendment filed with the presiding Administrative Law Judge within thirty (30) days of the release of this Order.

5. Since no determination has been received from the Federal Aviation Administration as to whether the proposed Elwood antenna towers would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Except as indicated by the issues specified below, all applicants are qualified to construct and operate as proposed. However, since the proposals are for different communities, we will specify an issue to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal would better provide a fair, efficient, and equitable distribution of radio service. We will also specify a contingent comparative issue, should such an evaluation of the proposals prove warranted.

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Frank Elwood and Wanda Jean Elwood would constitute a hazard to air navigation.

2. To determine: (a) the areas and populations which would gain or lose primary aural service from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which proposal would better provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding.

8. IT IS FURTHER ORDERED, That the petition to dismiss filed by Daystar Radio, Ltd. IS DISMISSED AS MOOT.

9. IT IS FURTHER ORDERED, That Frank Elwood and Wanda Jean Elwood file an amendment to provide the correct tower height information and site photographs with the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding shall be served

on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C.

11. IT IS FURTHER ORDERED, That to avail themselves of an opportunity to be heard, the applicants shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 15, 1988,** file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Had Elwood's application been returned as unacceptable for filing because of the alleged contour overlap, it would have been allowed to file a curative amendment within 30 days. *See Broadcast Station (Defective AM and FM* Applications), 56 RR 2d 776 (1984). Although the Commission never returned Elwood's application, Elwood amended its application to eliminate the alleged contour overlap within 30 days of the filing of Daystar's petition to dismiss. Thus, acceptance of Elwood's amendment is consistent with the Commission's policy permitting the amendment of defective AM applications. However, Elwood may not gain any comparative advantage from its July 16, 1987 amendment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-251

In re Applications of

Charles E. Franklin d/b/a FRANKLIN BROADCASTING (hereafter Franklin) — File No. BPH-860306ME

HEMINGWAY BROADCASTING COMPANY, INC. (hereafter Hemingway) — File No. BPH-860314ML

WILLIAM H. BURCKHALTER & CYNTHIA B. MERRITHEW (hereafter B&M) — File No. BPH-860407MF

For a Construction Permit
for a New FM Station
on Channel 286A at
Johnsonville, South Carolina

HEARING DESIGNATION ORDER

Adopted: May 12, 1988; Released: May 25, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *B&M.* The 7.5 minute site map submitted by B&M does not allow a determination of ground elevation; however, the site is plotted in the correct location. The site on the 15 minute site map is plotted incorrectly; however, the ground elevations can be determined from the map. Therefore, relying on both maps, and drawing on the application as a whole, will allow us to verify both the site location and ground elevation as correctly stated in Sections V-B and V-G of the application. However, B&M will be required to submit an amendment to the presiding Administrative Law Judge correcting all discrepancies within thirty (30) days of the release date of this Order.

3. Both Section V-G and FAA Form 7460-1 show B&M's overall tower height (including lighting) to be 350 feet AGL and 390 feet AMSL. In addition, the height of antenna radiation center above ground is consistently specified as 328 feet in Section V-B and on the antenna sketch, and the height of antenna radiation center above mean sea level is consistently shown as 368 feet in Section V-B and on the antenna sketch. However, the sketch is obviously mislabeled in that both the overall tower height and the center of radiation are indicated to be 328 HGL above ground. Therefore, the Commission staff can confidently and reliably ascertain that the tower height (including lighting) values listed in Section V-B are correct. However, B&M will be required to submit an amendment to the presiding Administrative Law Judge correcting this discrepancy within thirty (30) days of the release date of this Order.

4. *Other Matters.* Data submitted by the applicants indicate there would be significant differences in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Surevey Branch and the following applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by the applicant below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

APPLICANT: B&M.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: B&M.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That B&M shall submit the appropriate engineering data, discussed in paragraphs 2 and 3 herein above, to the Administrative Law Judge, within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 15, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-252

In re Applications of

Malcolm Kahn *et al., d/b/a* CATSKILL BROADCASTING COMPANY A GENERAL PARTNERSHIP	File No. BPH-870430NG
JOHN JAY ISELIN (hereafter Iselin)	File No. BPH-870430NH
CARMINE A. PIZZA, GENERAL PARTNER CATSKILL FM, LTD., A LIMITED PARTNERSHIP (hereafter CFL)	File No. BPH-870430NI

For Construction Permit
for a New FM Station
in Catskill, New York
Channel 253A (90.5 MHz)

HEARING DESIGNATION ORDER

Adopted: May 12, 1988; Released: May 25, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Iselin.* Iselin proposes an effective radiated power (ERP) of 2.45 kilowatts and an antenna height above average terrain (HAAT) of 113 meters. This ERP/HAAT combination exceeds the maximum facilities allowed for a Class A station pursuant to 47 C.F.R. § 73.211. In order to comply, Iselin will have to reduce his ERP to 2.35 kilowatts. In this case, the discrepancy is neither a tenderability nor an acceptability defect insofar as the minimal nature of the defect appears attributable to the imprecision inherent in manually ascertaining from the Commission's propagation curves the exact radiation value corresponding to the maximum permitted under the rules. Therefore, the discrepancy may be resolved by an amendment. Accordingly, Iselin will be required to file with the presiding Administrative Law Judge within 30 days of the date of this Order an amendment correcting this discrepancy.

3. *CFL.* CFL proposes to co-locate its antenna on the existing WCKL (AM) tower. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that CFL may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since CFL's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R § 1.1311. This study must include a detailed study of how the effects of AM station WCKL were calculated. Accordingly, CFL will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

4. On March 7, 1988, Iselin filed a petition to deny CFL's application. Iselin's allegations repeated those contained in its May 29, 1987 motion to dismiss CFL's application, specifically that "the engineering portion of CFL's application provides an incorrect value for the elevation of the transmitter site." CFL, proposing to sidemount its antenna on the WCKL(AM) tower, lists the site elevation above mean sea level as 65.5 meters (215 feet); Iselin claims that its independent plotting of the site indicates a correct elevation of 58 meters (190 feet). CFL opposed Iselin's initial motion, arguing that the data was derived from information already in the Commission's data base for the existing antenna structure proposed by CFL. Any discrepancy, CFL argued, is not fatally defective since its data "conforms to that on file for the proposed site" and "there would not appear to be any defect or omission that would make it unacceptable for tender under the Commission's new policies for the acceptability of FM applications." We agree. This error has no effect on the acceptability of CFL's application, which complies with all of our technical acceptance requirements. Our analysis confirms that the heights claimed by CFL have been part of the Commission's (BP-17,743, granted October 20, 1968) records for nearly twenty years, but that the map provided with its application reveals a site elevation of 185 feet. As CFL points out, "the only way we know to determine the actual ground elevation is through a survey" of its proposed site, which is owned by the limited partner of CFL, Catskill Communications, Inc., licensee of WCKL (AM), "and this Iselin has not done." Accordingly, Iselin's pleadings will be denied but CFL will be required to file a clarifying amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues.

1. If a final environmental impact statement is issued with respect to CFL in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That Iselin shall file an amendment correcting its effective radiated power as described in paragraph hereinabove with the presiding Administrative Law Judge within 30 days of the release of this Order.

8. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, CFL shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

9. IT IS FURTHER ORDERED, That Iselin's motion to dismiss and petition to deny CFL's application ARE DENIED, but that CFL is ordered to file an amendment clarifying the elevation above mean sea level of its proposed site with the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That, in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 15, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-250

In re Applications of

PANHANDLE COMMUNICATIONS, INC. (hereafter Panhandle)	File No. BPH-850709MD
PN RADIO COMPANY (hereafter PN)	File No. BPH-850711MS
DEE WETMORE	File No. BPH-850712U7

For Construction Permit
For a New FM Station at
Port Saint Joe, Florida
Channel 228A (93.5 MHz)

HEARING DESIGNATION ORDER

Adopted: May 12, 1988; Released: May 25, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Panhandle*. Panhandle proposes to co-locate on the existing WJBU (AM) tower. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Panhandle may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Panhandle's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the cumulative effect of the proposed station, the co-located AM station and all nearby RF sources. In this regard, if the site is presently fenced in compliance with the guidelines, Panhandle is required to so state and give the distance from the base of the tower to the fence. Accordingly, Panhandle will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

3. *PN*. Broadcast Data Corp. is a general partner in PN, owning 49% of the partnership interest. PN has stated in Exhibit II-1 of its application that "[i]n an action relative to Broadcast Data Corp.'s parent company, Graphic Scanning Corp., by Order released August 24, 1982 (FCC-391), the Commission designated for hearing applications filed by A.S.D. Answer Service, Inc.; B.W. Communications, Inc.; Vineyard Communications, Inc.; and P.A.L. Communications Systems, Inc. The stated purpose of the proceeding was to determine the relationship between Graphic and the applicants and, in particular, whether Graphic is a real party-in-interest in the applicants. In an Initial Decision released January 9, 1985, the presiding Administrative Law Judge concluded (a) that, because of the non-traditional nature of the transactions involved, Graphic shall be deemed the real party-in-interest in the A.S.D., Vineyard, P.A.L. and B.W. applications; and (b) that all parties had exhibited a lack of candor and on occasion, intentionally misrepresented material facts to the Commission."

4. Claiming the above conclusions were without merit, Graphic filed exceptions with the Commission on March 15, 1985. After a proxy fight resulted in new management, Graphic asked the Commission to approve a settlement between the concerned parties. By its *Memorandum Opinion and Order*, released November 21, 1986, the Commission approved such an agreement vacating the conclusions reached in the *Initial Decision*. This sanction absolved the revised Graphic entity from the Administrative Law Judge's adverse conclusions, but held that the findings would apply if former Graphic principals Yampol, Slodowitz and Finfer, who were active in management at the time of the alleged misconduct, were to regain control of Graphic. *A. S. D. Answer Service et al.*, 1 FCC Rcd 753 (1986), at paragraph 6. A petition for reconsideration of this action has been filed.

5. PN has also indicated in Exhibit II-1 that an affiliate of Broadcast Data Corp.'s parent company, Graphic Scanning Corp., has been named as a defendant in a lawsuit captioned *Utah Telecourier v. MCI Telecommunications Corporation, et al.*, (W.D. Utah, 1984) in which the trading of interests in cellular radio telephone partnerships in connection with the Salt Lake City, Utah market has been challenged under state and federal anti-trust laws.

6. Further review of PN's application indicates a discrepancy in the number of general partners in the partnership. In response to question 5(a) of Section II of the application concerning the parties to the application, PN lists Broadcast Data Corp. and Private Networks Radio, Inc. as its only general partners. However, in a petition for reconsideration filed on January 9, 1986 by Richard L. Vega, he refers to himself as PN's "General Partner and Engineer."[1] Furthermore, in an amendment filed January 4, 1987, disclosing the principals of both Broadcast Data Corp. and Private Networks Radio, Inc., no mention is

made of Richard L. Vega. Accordingly, PN will be required to file an amendment eliminating the apparent discrepancy within 30 days of the release of this Order with the presiding Administrative Law Judge.

7. PN has petitioned for leave to amend its application on August 12 and October 8, 1987 and on January 4, January 14, February 1 and April 18, 1988. The accompanying amendments were filed after September 23, 1985, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

8. *Other matters*. Data submitted by the applicants indicate there would be significant difference in the size of the areas which would receive service from the proposals. Consequently, the areas which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Panhandle in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, Panhandle shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

12. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to PN as a result of this proceeding, its grant will be without prejudice to (i) whatever action, if any, the Commission may deem appropriate should former Graphic principals Yampol, Slodowitz and Finfer regain control of Graphic; or in light of the outcome of (ii) the appeal in *A. S. D. Answer Service, Inc. et al* CC Docket No. 82-587 *et seq* ; or (iii) *Utah Telecourier v. MCI Telecommunications Corporation et al*

13. IT IS FURTHER ORDERED, That PN shall file its amendment of Section II, Item 5 (and, if appropriate, Items 6-8) of FCC Form 301 to provide the information required as to the parties to the applicant with the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by PN ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 15, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] PN's application was originally returned as unacceptable for filing on December 20, 1985, and was later reinstated *nunc* pro tunc after the filing of the petition for reconsideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-49

In re Applications of

Seattle Public Schools — File No. BRED-830922AQ

For Renewal of License
For Station KNHC(FM),
Seattle, Washington

and

JACK STRAW MEMORIAL FOUNDATION — File No. BPED-840103AR
Seattle, Washington

For Construction Permit
for a New FM Station

Appearances

Sally Katzen and *Margaret L. Tobey*, on behalf of Seattle Public Schools; *Michael H. Bader*, *Richard M. Riehl*, and *John Crigler*, on behalf of Jack Straw Memorial Foundation; and *Charles E. Dziedzic*, *Norman Goldstein*, and *Linda R. Bocchi*, on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: May 17, 1988; Released: May 27, 1988

PRELIMINARY STATEMENT

1. This comparative noncommercial broadcast proceeding involves the mutually exclusive applications of Seattle Public Schools (School System) and Jack Straw Memorial Foundation (Jack Straw). The School System seeks renewal of its license to operate Station KNHC(FM) on reserved frequency 89.5 MHz, Seattle, Washington, which has been licensed to it since 1971. Jack Straw seeks grant of an application for a construction permit for the same frequency.

2. The School System filed its application for renewal on September 22, 1983 (File No. BRED-830922AQ). Jack Straw filed its application for a construction permit on January 3, 1984 (File No. BPED-840103AM). The construction permit application was technically for full-time operation of the station, but Jack Straw stated in its transmittal letter and in an exhibit to the application that its objective was to share time on the frequency with the School System. (*See* Hearing Designation Order, FCC 86-71 at para. 2 (released Feb. 7, 1986), 103 FCC 2d 862 (1986) (HDO).) Jack Straw's theory was that a share-time arrangement was called for under Section 73.561(b) of the Commission's Rules because the School System had operated KNHC less than 84 hours a week during part of the preceding license period (HDO, para. 5).

3. The two applications were designated for hearing on February 7, 1986. The Commission determined to treat Jack Straw's application as one for share-time rather than full-time operation for two reasons. The Commission stated that "Jack Straw's stated goal in filing its application was to obtain a share-time arrangement with the School System . . . ." (HDO, para. 7). It also stated that the School System was "fully qualified to remain a Commission licensee," that its renewal application "would have been granted routinely but for Jack Straw's competing application," and that it therefore should not have to face the prospect of losing its license entirely. (*Id.*).

4. Because of certain deficiencies in Jack Straw's application, the Commission designated financial and contingent environmental issues against Jack Straw. All told, the original HDO specified that the applications were designated for hearing on the following issues:

> 1. To determine whether, in light of the evidence adduced concerning the deficiency set forth in paragraph 9, *supra*, Jack Straw is financially qualified.
>
> 2. If a final environmental impact statement is issued with respect to Jack Straw which concludes that the proposed facilities are likely to have an adverse effect on the quality of the environment,
>
> (a) to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 CFR Sections 1.1301-19; and
>
> (b) whether, in light of the evidence adduced pursuant to (a) above, Jack Straw is qualified to construct and operate as proposed.
>
> 3. To determine whether a share-time arrangement between the School System and Jack Straw would result in more effective use of the specified channel than would operation restricted to the School System and thus better serve the public interest, and, if so, the terms and conditions of the arrangement.

5. On March 10, 1986, Jack Straw filed a petition for reconsideration of the HDO, arguing that it was entitled to be considered as a full-time applicant for the channel and that, by limiting the case to a share-time issue, the Commission had deprived it of its rights to a hearing on its application under *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945). (Petition for Reconsideration filed by Jack Straw at 4-5 (March 10, 1986).) Jack Straw also argued in its petition that the share-time rule is a *per se* rule, which requires an inefficient station to share time if an appropriate application is filed. Jack Straw asserted that the School System had operated less than 84 hours per week during the license period; that Jack Straw's filing qualified as an appropriate application under Section 73.561(b); and that therefore the sole issue for determination under the share-time issue was not whether to impose an arrangement, but rather the amount of time to be allocated to each party. (*Id.* at 5-6.

6. By Memorandum Opinion and Order released July 14, 1986 (FCC 86- 318), 60 Rad. Reg. 2d (P&F) 1073 (1986), the Commission granted in part Jack Straw's petition for reconsideration. The Commission found that al-

though the limited share-time issue specified by the original HDO was reasonable in view of the statements in Jack Straw's application that it did not wish to displace the School System as the licensee on the channel, it also accepted the explanation offered by Jack Straw in its petition that it wanted to be considered for full-time operation unless the Commission determined that time- sharing was mandatory under the rule. (*Id.*, para. 7). However, the Commission rejected Jack Straw's argument that the share-time rule is a *per se* rule, stating that a time-sharing arrangement was not mandatory simply because the station had operated less than 12 hours a day for a period of months prior to the filing of the Jack Straw application (*Id.*, para. 8).

7. As a result of the reconsideration, the HDO was modified to specify, in addition to the financial and contingent environmental issues designated against Jack Straw in the original HDO, the following standard noncommercial comparative issues for hearing.

> 3. To determine whether a share-time arrangement between the School System and Jack Straw would result in the most effective use of the specified channel and thus better serve the public interest, and, if so, the terms and conditions of the arrangement.
>
> 4. To determine: (a) the extent to which the proposed operation of Jack Straw and the proposed operation of the School System will be integrated into the overall cultural and educational objectives of the respective applicants; (b) the manner in which the proposed operation of the Jack Straw and the proposed operation of the School System meet the needs of the community to be served; and (c) whether other factors in the record demonstrate that one applicant will provide a superior noncommercial radio broadcast service.
>
> 5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. On April 7, 1986, prior to the release of the order on reconsideration, the School System filed a Motion to Enlarge Issues, seeking, *inter alia*, the addition of a misrepresentation issue against Jack Straw. By Memorandum Opinion and Order released August 29, 1986 (FCC 86M-2665), the Presiding Judge granted in part the School System's motion and designated the following misrepresentation issue against Jack Straw:

> To determine whether, in its opposition to a petition to deny the KRAB assignment application or in a proposed amendment to the present application, Jack Straw Memorial Foundation has misrepresented its intentions with respect to its contract right to co-locate any new facilities it might acquire with the facilities of its assignee, Station KGMI, and, if so, to determine the effect of such misrepresentation on Jack Straw's basic qualifications to be a Commission licensee.

Jack Straw had the burden of going forward and the burden of proof on the misrepresentation issue. (*Id.* at 4).

9. On November 25, 1986, the Presiding Judge ruled that the areas and populations of the mutually exclusive applicants at the 60 dbu level, together with the availability of other noncommercial broadcast facilities may be considered under the standard comparative issue (Tr. 573-575). He specifically enjointed the parties to prepare a joint comparative coverage engineering exhibit which takes into consideration shadowing, particularly if Jack Straw insists that it is entitled to a preference for white or grey area coverage (Tr. 2509).[1]

10. The contingent environmental and financial issues were resolved in favor of Jack Straw in advance of the hearing. The Presiding Judge received and accepted the recommendation of the Audio Services Division that Jack Straw's proposal, as set forth in its application, did not constitute a major environmental action and that therefore the issue should be deleted subject to certain conditions imposed on Jack Straw in the event its application were granted (Tr. 5). With respect to the financial issue, by Memorandum Opinion and Order released August 29, 1986 (FCC 86M-2664), Jack Straw's motion for summary decision was granted.

11. Direct case exhibits were exchanged by the parties on November 10, 1986. Admissions sessions were held on November 24 and 25, 1986. On December 1-4, 1986, counsel for Jack Straw and the Mass Media Bureau cross-examined four School System witnesses in Washington, D.C. These witnesses were Gregg Neilson, who has been involved in the radio communications program at Nathan Hale High School (where the KNHC studio is located) in some capacity since 1978 and the General Manager of Station KNHC since October 1983 (Neilson, SPS Ex. 1); Thomas Hodgson, former Director of Vocational Education for the School System, with line responsibility for the station during the period when the hours of operation were below 84 hours per week (Hodgson, SPS Ex. 2); T. J. Vassar, a member of the School Board since 1981 who was selected as the Board's representative not only because of his familiarity with and interest in the station as a result of having hosted a regular program on KNHC, "What's Happening in the Schools," during the renewal period (Vassar, SPS Ex. 3); and Jay Wang, the instructor for the mirror communications programs at Cleveland High School (Wang, SPS Ex. 4).[2]

12. On December 8-11, 1986, counsel for the School System and the Mass Media Bureau cross-examined three witnesses for Jack Straw in Washington, D.C. These witnesses were Gary Margason, Jack Straw's Vice President for Broadcasting, who offered testimony on Jack Straw's educational program and sharetime proposal (Margason, JS Ex. 1; Margason, JS Ex. 35); Elizabeth Sinclair, Jack Straw's Vice President and principal programming witness (Sinclair, JS Ex. 3); and Benjamin Dawson, a member of Jack Straw's Board of Trustees and a partner in the communications engineering firm of Hatfield & Dawson, consulting radio engineers to Jack Straw (Dawson, JS Ex. 4; Dawson, JS Ex. 40; *see* Dawson, Tr. 2473).

13. On December 16, 1986, Jack Straw and the Mass Media Bureau cross- examined Doris Kyle, a Guidance Counselor at Nathan Hale High School, and the only public witnesses offered by the School System who had been requested to come to Washington for cross-examination (Kyle, SPS Ex. 27). On the same date, the School System and the Mass Media Bureau cross-examined Jack Straw's rebuttal witness, Richard Alexander, a former member of the School Board (Alexander, JS

Ex. 32). The record in the case was closed by order of the Presiding Judge released March 12, 1987 (FCC 87M-534). Proposed findings of fact and conclusions of law were filed March 17, 1987 by the parties;[3] replies were filed April 3, 1987 by the School System and Jack Straw.[4]

FINDINGS OF FACT
SEATTLE PUBLIC SCHOOLS

Background

14. Station KNHC(FM) is licensed to the Seattle Public Schools and is located in Nathan Hale High School, one of ten high schools in the Seattle Public School District (Neilson, SPS Ex. 1, para. 1; Neilson, Tr. 742; Hoge, Tr. 1017). The station first went on the air on January 25, 1971, with an effective radiated power of 10 watts (Neilson SPS Ex. 1, para. 13). The station was the brain child of and initially licensed to Lawrence Adams, a radio communications instructor at Nathan Hale and former Station Manager. (*Id.*) At the same time the station was established, Mr. Adams was a newly hired electronics teacher who was seeking an exciting teaching tool that would bring basic electronics to life for his students. (*Id.*)

15. The station was transferred to the School System's Board of Directors in 1976, pursuant to a transfer of control application (Neilson, SPS Ex. 1, para. 14). The Board delegates responsibility for certain aspects of the station's operation through a chain of command that has changed several times during the license renewal period (February 1, 1981, through January 31, 1984) and thereafter. From the start of the renewal period until early 1983, the chain of command consisted of: the Superintendent, the Assistant Superintendent for Curriculum and Instruction, the Director of Vocational Education, the Principal of Nathan Hale High School, and the instructor(s) in the radio communications proId.) In early 1983, the position of Station Manager, who reported to the Nathan Hale Principal, was created. From early 1983 to October 1986, the Director of Secondary Education replaced the Director of Vocational Education in the chain of command. In October 1983, the position of Station Manager was reclassified and renamed "General Manager." In October 1986, the Director of Vocational Education was restored to the chain of command, replacing the Director of Secondary Education, and the Assistant Superintendent for Curriculum and Instruction was replaced by the Assistant Superintendent for School Operations. (*Id.*)

16. Since 1971, Station KNHC has been an integral part of the School System's vocational education program in electronics and radio communications (Neilson, SPS Ex. 1, para. 18). One basic goal of vocational education in the Seattle Public Schools is to provide students with specific job skills that enable them to move directly from high school into skilled starting level positions or to seek advanced training in colleges, universities, and vocational institutions. (*Id.*) Thus, one primary educational objective of the radio communications program is to give students hands-on training in the basic operation, management, programming, and engineering of a radio broadcast station. (*Id.*)

17. Another basic objective of the radio station and the communications program is to meet the needs of the community, both by providing an educational opportunity for its young people and by broadcasting programming that addresses issues of concern to members of the community, including public affairs programming produced and aired by students enrolled in the communications program (Neilson, SPS Ex. 1, para. 12).

School System's Renewal Expectancy

18. The School System submitted evidence of its performance as a noncommercial licensee during the license renewal period (February 1, 1981, through January 31, 1984) in order to support its claim to a renewal expectancy. This evidence -- which relates to the past integration of the operation of Station KNHC into the educational and cultural objectives of the School System; the past efforts of the licensee to meet community need; and other factors -- is summarized below.

Integration of Station KNHC into the School System's Educational and Cultural Objectives

19. Station KNHC has been a component of the School System's vocational education program in electronics and radio communications since the station first went on the air in January 1971 (Neilson, SPS Ex. 1, paras 13, 18). The basic educational objective of the program has been to teach students how to operate a commercial radio station (*Id.*, para. 18). To that end, the School System has developed a comprehensive curriculum that places special emphasis on developing skills in pre-production, production, and post-production aspects of radio broadcasting (*Id.*, paras. 18-22).

20. Since its inception, the School System's radio communications program has been headquartered in a converted study hall in Nathan Hale High School, which is located in Seattle's northeast end (Neilson, SPS Ex. 1, para. 15). One half of the room has been arranged in typical classroom fashion and is devoted to the "book learning" component of the communications program. The other half of the room houses two fully equipped broadcast studios (Studios A and B), as well as the station's record and tape collections, files and reference materials, and work space for the students and adult staff. (*Id.*) Studio A is the primary broadcast studio, and Studio B is the primary production studio. (*Id.*) Although both studios were recently remodeled and their equipment inventories expanded (*see* paras. 164-65, *infra),* they contained, during the license renewal period, the full range of equipment one would expect to find in a commercial FM radio station of comparable size (Neilson, SPS Ex. 1, para. 16; *see also* Neilson, Tr. 658-661). A second classroom adjacent to the radio room has been devoted continuously to television production activities (Neilson, SPS Ex. 1, para. 15).

21. The station's transmitting antenna is a six-bay Phelps Dodge that has been located at a nearby elementary school and operated by remote control from Nathan Hale (Neilson, SPS Ex. 1, para. 17). Since 1971, the station has sought and obtained a number of power increases -- from 10 watts to 320 watts in 1972 and to 1500 watts in 1974. (*Id.*) Since 1980, the station has operated at 3000 watts. (*Id.* ; *see also* Neilson, Tr. 740)[5]

22. During the license renewal period, the School System's radio communications program consisted basically of a two-level course offering (Neilson SPS Ex. 1, para. 19). The first level was an introductory course in radio and television that covered the following major units: basic electronics theory, the history of broadcast communication, the technology of radio and television stations, basic

broadcast law and the role of the Federal Communications Commission, station management, and program production for both radio and television. (*Id., see also id.*, Attachment B, "Course Information and Goals for Introduction to Radio and Television"; Neilson, Tr. 664-665). The second-level course was an advanced course that prepared students for employment in broadcasting and related fields through hands-on education in the form of substantial responsibility for the operation of Station KNHC (Neilson, SPS Ex. 1, para. 19; *see also id.*, Attachment C, "Course Information and Goals for Radio Communications"; Neilson, Tr. 664-665). In general, successful completion of the introductory course is a prerequisite to enrollment in the advanced course (Neilson, SPS Ex. 1, para. 23). Students enrolled in both the introductory and advanced courses received 1.5 credits toward graduation for each semester class successfully completed, and multiple enrollments in the advanced course by an individual student were permitted, both within a single semester and in successive semesters (*see* Neilson, SPS Ex. 1, para. 23 & Attachments C & G).

23. The following chart sets forth the enrollments in the introductory and advanced courses during the license renewal period. As noted above, some advanced students may take more than one advanced course in any given semester; the numbers of advanced students shown below excludes multiple enrollment within a single semester. The numbers for each semester do not exclude enrollment by the same student in successive semesters. However, for Nathan Hale enrollments, the number of students enrolling in the advanced courses for the first time each semester appears in the far right column.

Nathan Hale High School

Semester	Intro. Students	Advanced Students	Total	New Adv. Students
Spring 1981	*	*	*	*
Fall 1981	*	*	*	*
Spring 1982	*	*	*	*
Fall 1982	69	20	89	20
Spring 1983	21	37	58	23
Fall 1983	51	33	84	14
Spring 1984	23	52	75	35

Source: SPS Ex. 65-a.

Cleveland High School

Semester	Intro. Students	Advanced Students	Total
Spring 1981	5	9	14
Fall 1981	*	15	15
Spring 1982	55	34	89
Fall 1982	45	7	52
Spring 1983	50	29	79
Fall 1983	56	19	75
Spring 1984	39	36	75

Source: SPS Ex. 70.

* Records incomplete or missing. (*See infra* for post-renewal period enrollments.)

24. The operation of KNHC during the license renewal period was intended to mirror the operation of a commercial broadcast station (without airing commercials) to maximize the opportunity for graduates of the program to move directly into responsible positions in the broadcast industry (Neilson, SPS Ex. 1, para. 24). Because entertainment (music) formats predominate among commercial radio stations, the station has consistently followed a music format. (*Id.) From 1981 to 1983, the station featured a predominantly rhythm and blues sound and was the only station in SeattId.*) When a local commercial station shifted to a rhythm and blues format, the radio students and adult staff decided to develop a unique format for KNHC that would appeal especially to a teen-aged and young adult audience without duplicating either the Top 40 or the rhythm and blues formats of the other Seattle stations that were popular with young people. The format they developed at that time (late 1983-1984) was and is called "dance music" – music characterized by a strong and steady 4/4 beat, which creates a distinctive and "danceable" sound that has been identified with Station KNHC. (*Id.* ; *see* Neilson, Tr. 907-10). Because the station played the type of music teens and young adult wanted to hear, students were attracted to the vocational program and motivated to perform well once they were enrolled (Neilson, Tr. 888-889). Also, the popular music helped establish an audience among the young people to whom a portion of KNHC's nonentertainment programming was directed (Neilson, Tr. 734, 896-897).

25. During the license renewal period, the station's staff was divided into departments similar to those that would be found at a commercial radio station (with the obvious exception of "Sales). In all, there were 11 different functions in addition to on-air announcing – News, Sports, Music, Public Affairs, Continuity (PSAs), Network (non-locally produced nonentertainment programming), Production, Traffic, Public Relations, Engineering, and Safety (Neilson, SPS Ex. 1, para. 26). Qualified advanced students served as on-air announcers if they wished to do so. (*Id.*)[6] However, advanced students were not required to appear on-air to receive credit, and many students chose to remain "behind the scenes." (*Id.*, para. 22). All advanced students, including on-air announcers, were assigned to one of the departments listed above, and each of the departments had a student from one of the advanced classes as a director or manager. In addition, two qualified advanced students were selected each semester by the instructor of the radio communications courses, and later the General Manager, to serve as Station Manager and Program Director. (*Id.*, para. 26; Neilson, Tr. 661-662). In short, the day-to-day operation of KNHC was in the hands of the students, subject to the supervision of the instructor(s) and the station's General Manager.

26. The tasks assigned to the students were not makework or ministerial but rather substantive and in fact essential to the operation of the station (Neilson, Tr. 745-746). For example, the Station Manager, the senior student authority at KNHC, was responsible for the smooth functioning of all of the station's departments and for ensuring that the station operated in accordance with established policies and procedures (Neilson, SPS Ex. 1, para. 27). All other student manager reported to the Station Manager. (*Id.*)

27. The Program Director was responsible for maintaining professional air sound at KNHC; hence, he or she supervised those departments that had a direct bearing on

the sound of the station (Neilson, SPS Ex. 1, para. 28). One of the principal duties of the Program Director was to schedule (and rearrange when necessary) all air shifts and to regularly critique each announcer's air checks. (*Id.*) To stay in touch with the complexities of the day-to-day situations faced by broadcasters, the Program Director was required to pull a regular air shift. (*Id.*) The Program Director was also required to be thoroughly familiar with all Commission and station policies that affect program content, such as the fairness doctrine, personal attack rules, station conflict of interest rules, libel laws, inappropriate language rules, and the record lyric controversy. (*Id.*) Simply stated, the Program Director was expected to be alert to all production elements -- programming, copywriting, and announcing -- and to maintain a professional atmosphere in the station and among the station staff members. (*Id.*)

28. The News Director was responsible for writing, editing, and reporting local and regional radio news copy and for supervising the students in his or her department in the preparation of live on-air newscasts (Neilson, SPS Ex. 1, para. 30). The copy for the newscasts were derived primarily from the morning newspapers. The students in the News Department were responsible for reviewing the local newspapers, selecting appropriate local news items, and re-writing them for broadcast. Students who had progressed sufficiently in their on-air skills (at least second-semester advanced) were permitted to announce the news live; otherwise, they taped the newscasts for broadcast shortly thereafter. (*Id.*)

29. The Sports Director was responsible for all routine sports news, which was integrated into the regular news broadcasts during the school day, as well as other sports productions and features (Neilson, SPS Ex. 1, para. 31). This included responsibility for scheduling, assembling, and instructing the staff needed to broadcast live remote sports presentations. (*Id.*)

30. The Music Director was responsible for the "sound" of the radio station (Neilson, SPS Ex. 1, para. 32). During the latter part of the renewal part of the renewal period (1983-1984), the Music Director and station management instituted weekly meetings of the station's Music Committee (composed primarily of students) to select the music to be played by the station, to dub the music to cartridges (carts), to label the carts, and to place them in the broadcast studio where they would be easily accessible for the on-air announcers. (*Id.* ; *see also* Boyle, SPS Ex. 11, paras. 1, 4) During school year 1982-1983, one of the students in the program, John Boyle, helped to adapt a purchased computer program so that the program would generate random daily "plot sheets" or play lists for each broadcast day based on the musical selections made at the weekly Music Committee meetings (Boyle, SPS Ex. 11, paras. 2-3; *see also* Neilson, SPS Ex. 1, para. 32). The Music Director was also responsible for maintaining a professional relationship with music promoters, who were the primary sources for the station's records and tapes. This involved preparing a weekly play list for promoters listing the station's "high rotation," "mid rotation," "new adds," and "phone action" songs, as well as a weekly listing for "Cashbox" listing the station's top 20 songs and the five most popular "new adds" (Neilson, SPS Ex. 1, para. 32; *see also* Boyle, SPS Ex. 11, para. 4).

31. The Public Affairs Director at KNHC was responsible for all student-produced programming that addressed issues of concern to the community as identified through the ascertainment process (Neilson, SPS Ex. 1, para. 33). (Public affairs programming produced outside the School System was the responsibility of the student Network Director. (*See* para. 34, *supra.*)) The Public Affairs Director occasionally accompanied the General Manager to the regularly scheduled ascertainment meetings of Seattle broadcasters and was responsible for identifying the top ten issues of concern to the public (based on a statistical analysis of the ascertainment interview notes) and for compiling the annual (now quarterly) issue-responsive programming list (Neilson, SPS Ex. 1, para. 35). The students in the public affairs department were assigned a broad topic taken from the list of ascertained needs and interests, such as "Unemployment," and were then responsible for narrowing the issues to a suitable topic for a student-produced public affairs program, such as "Unemployment Among Teen-Agers" (Neilson, Tr. 790-791; Neilson, SPS Ex. 1, para. 34). To assist them in the identification of suitable topics for such programs, the students regularly reviewed local newspapers, notes from the ascertainment interviews, and other sources of topical and timely information (Neilson, SPS Ex. 1, para. 34). The Public Affairs Director was responsible for monitoring the progress of the student producers, including taping of the student-produced public affairs programs. The programs were then reviewed by the Program Director for their "airability." (*Id.*, para. 35).

32. The Continuity Director was responsible for the selection and production of all public service announcements (PSAs) and promotional announcements for KNHC and the Seattle School District (Neilson, SPS Ex. 1, para. 42). The station has had a policy and practice of broadcasting a large number of PSAs. (*Id.* ; *see* paras. 109-110, *infra).* As a result, the station received as many as 100 requests a week from organizations who wanted the station to air their PSAs (Neilson, SPS Ex. 1, para. 42). The Continuity Director was responsible for screening these requests and making selections from among them. After the selection was made, the Continuity Director (or a member of the Continuity Department) taped and carted a live reading of the PSA copy and prepared the cart for broadcast by assigning it a number and describing it by title, sponsor, duration, and out-cue. This information was then transferred to an index card forwarded to the Traffic Department for scheduling. (*Id.*)

33. The Network Director was responsible for the review and acceptance of all broadcast materials that came into the station from various outside sources (Neilson, SPS Ex. 1, para. 43). These included educational institutions (such as the Washington State University Tape Network and Cornell University), trade and professional organizations (such as the Edison Electrical Institute and the American Chemical Society), and governmental agencies (such as the National Aeronautical and Space Administration) (Neilson, SPS Exs. 58-51 *passim).* The Network Director was also responsible for preparing a "network log" by which he or she scheduled these programs as well as the nonentertainment programming produced by KNHC (Neilson, SPS Ex. 1, paras. 29, 43).

34. The Production Director had two primary areas of responsibility -- coordinating the work of the various departments so that continuing programs were carried out in a professional manner and working diligently at stimulating and developing new program ideas (Neilson, SPS Ex. 1, para. 44). In addition, the Production Director was

responsible for the scheduling, operation, and maintenance of the station's production studio, as well as the training of other students in the use of the production studio. (*Id.*)

35. The Traffic Director was responsible for the production of the daily program logs (Neilson, SPS Ex. 1, para. 45). The logs were compiled from the network logs, the PSA index cards, the promotional announcement and underwriting credit lists, and the regularly scheduled programs such as news and sports broadcasts. (*Id.*) At the beginning of each semester, the Traffic Director was alone responsible for preparing each day's logs; after the members of the Traffic Department had learned how to prepare logs, the Traffic Director assigned each of them a day of the week for which they were responsible, so that Student A always prepared Monday's logs, Student B always prepared Tuesday's logs, and so on. (*Id.*, para. 59). Although the Commission's rules have not required program logs to be kept since February 1981, the station's policy is and has been to prepare and retain complete daily program and operations logs. (*Id.*, para. 29).

36. The Public Relations Director was responsible for providing the media -- including local radio and television stations and newspapers -- information concerning KNHC (Neilson, SPS Ex. 1, para. 47). He or she was also expected to seek other ways to enhance the station's image and general public awareness of the station. (*Id.*)

37. The student Engineer was expected to be familiar with the operation and maintenance of the station control room, production room, and transmitter site equipment (Neilson, SPS Ex. 1, para. 46). The student Engineer also investigated discrepancy reports and equipment failures and was expected to take action as required. (*Id.*)

38. The Safety Director was responsible for maintaining a safe working and learning environment in the station (Neilson, SPS Ex. 1, para. 48). This responsibility included awareness and prevention of electrical hazards, fire evacuation procedures, earthquake drills, and, in general, implementing safety procedures in accordance with District and building policies. (*Id.*)

39. As noted above (para. 25), certain advanced students qualified for positions as on-air announcers. This involved preparing an acceptable audition tape, which was approved by the Program Director, and otherwise satisfying the requirements for board operation (Neilson, Tr. 768-769; Neilson, SPS Ex. 1, para. 22). The on-air announcers carried the responsibility of maintaining and enhancing the station's public image. In addition, they were frequently required to provide programming materials (including news broadcasts), operate equipment, maintain announcer and operation logs, meet emergency situations, take and log meter readings for monitoring transmitter parameters, and answer telephones (Neilson, SPS Ex. 1, para. 40). The on-air announcer also initiated and received weekly EBS tests. Each on-air announcer was required to read and sign the station's plugola-payola affidavit, a matter treated with utmost seriousness by the station. (*Id.*)

40. In addition to his or her departmental and on-air responsibilities, each advanced student was responsible for achieving the specific "Student Learning Objectives" mandated by the School System for the radio communications curriculum (Neilson, SPS Ex. 1, para. 49; SPS Ex. 64; Neilson, Tr. 669-670). In order to accomplish these tasks, the students used different days of the week to focus on their different responsibilities. For example, a student assigned to the News Department would be responsible for writing and broadcasting or taping the news on Mondays, Wednesdays, and Fridays; on Tuesdays and Thursdays, that student would work on his or her Student Learning Objectives (Neilson, SPS Ex. 1, para. 49). Likewise, on-air announcers would appear on the air certain days of the week and would be expected to work on their other assignments on their "off" days. When a student mastered the curriculum in one of the departments, he or she might be transferred to another (Neilson, Tr. 783-784). Taken together, this system guaranteed that the students would be exposed to a wide range of radio station activities, all under the supervision of the radio communications instructor(s) or the General Manager (Neilson, Tr. 750-752).

41. The operation of the station was divided temporally as well as functionally. Sign-on occurred generally at 8:00 a.m., shortly after the beginning of classes. The school day -- which ran from 7:40 a.m. until 2:15 m. -- was divided into six periods, each 55 minutes long (Neilson, SPS Ex. 1, paras. 25, 50). The introductory course was taught during three of these periods, but the advanced course was available in all six periods. (*Id.*, para. 50). Students who operated the radio station during the after-school hours were permitted to sign up for a seventh period so that they received credit for these hours; likewise, an eighth period class was available for students who operated the station on weekends. (*Id.*, para. 61).

42. Throughout the school day, the student Directors and the members of their departments moved in and out of the radio station, according to their class schedules (Neilson, SPS Ex. 1, para. 58). The advanced students worked independently, although under the supervision of the General Manager, on the tasks assigned to their departments. (*Id.*) During the course of the day, the General Manager met with all of the student Directors to ensure that they were staying in touch with the members of their departments and that the work of their departments was proceeding at the proper pace. (*Id.*)

43. During the school day, the student announcers' shifts were usually 55 minutes long -- a standard class period (Neilson, SPS Ex. 1, para. 50). As a result of the limited amount of time between class periods, the on- air announcer for the next period had to leave his previous class promptly and rush to the broadcast studio, so that the current on-air announcer could leave the broadcast studio and get to his or her next class on time. (*Id.*, para. 53). After school, on weekends and holidays, and during summer vacations, the air shifts were usually 3 hours in length to more closely approximate the working conditions the students would encounter when they became employed at commercial stations. (*Id.*, para. 50). These longer shifts also helped the advanced students to develop the "staying power" and the ability to respond to the unexpected that has distinguished them in their subsequent employment in commercial stations. (*Id.*, para. 61) Student announcers' air shifts generally ended by 8:00 p.m., especially on week nights, so that they would be able to do their homework and get a good night's sleep. (*Id.*, paras. 50, 64) From 8:00 m. to sign-off, the air shifts were handled by adult volunteers, most of whom had professional broadcast experience (*id.*, para. 65);[7] the material broadcast by these adults was prepared and scheduled by students during the day. (*Id.*)

44. To summarize, throughout the license renewal period, the student directors and department members bore substantial responsibility for the day- to-day operation of the radio station. For all but seven months of the license renewal period (*see* paras. 140-154, *infra*), this operation

met or exceeded the Commission's definition of "full-time" operation – i.e., a minimum of 84 hours a week, 52 weeks a year. (*See* Neilson, SPS Ex. 1, Attachment D, "Station KNHC's Operating Hours and Student On-Air Hours During the Period February 1981-August 1986.) As a result, the advanced radio students acquired the kind of technical skills that enabled a number of them to obtain employment in broadcasting and related fields directly after graduation from high school (*see* para. 64, *infra),* and others to move on to advanced programs at colleges, universities, and vocational institutions. (*See* para. 65, *infra.*)

45. In addition, the radio program taught the students both the benefits and the responsibilities inherent in a team effort. *See , e. g.*, Beatty-Yasutake, SPS Ex. 6, para. 2 (KNHC "taught me to work successfully with both my peers and with adults in the community.) Freeman, SPS Ex. 19, para. 2 (Equally important [to developing broadcasting skills] are the social and personal skills one develops through responsibility to a team of peers.); Higbee, SPS Ex. 23, para. 7 (Because the program is a part of the magnet program in the Seattle School District, it involves a very diverse group of people: males and females from all different races, age groups, backgrounds, and intelligence levels. The program unites all these people because they have one common goal, to make KNHC as successful a radio station as possible.); Murphy, SPS Ex. 42, para. 10 (We all worked hard at the station and felt we were part of a family. Like all families, we had our problems but I am proud that a team of diverse individuals could work together to produce the best radio program possible.); Price, SPS Ex. 45, para. 8 (I learned about how to get along with all different types of people, and how to deal with a lot of egos.); Ross, SPS Ex. 47, para. 5 (I learned how to work with and manage people my own age by gaining their respect . . . .); Wilson, SPS Ex. 56, para. 4 (The people in the radio program made the experience worthwhile for me. We were like one big family with everyone working together.)

46. The radio program allowed the students to mature and develop as individuals in other ways as well. *See* e. *g.*, Neilson, Tr. 906-907; Beatty- Yasutake, SPS Ex. 6, para. 2 (I gained maturity and a sense of responsibility because of my involvement with KNHC. This kind of personal growth is as important as the specific broadcasting skills I learned . . . .); Murphy, SPS Ex. 42, para. 8 (The program "helped me to build my confidence, expand my vocabulary, project a positive image, and communicate effectively with people.); Ross, SPS Ex. 47, para. 6 (The friendships and personal growth that resulted from my involvement in the radio program gave me an invaluable head start in college and in life.); Shostak, SPS Ex. 50, para. 7 ([T]he program allowed people to expand who they were; it did not try to mold people into a certain image.)

47. Several adults who are familiar with the radio program confirmed the students' view that the radio program contributed to their personal development. *See , e. g.*, Bowersox, SPS Ex. 9, paras. 6-7 (In particular, the students develop a sense of responsibility from their involvement at the station; they treat their on-air and off-air duties as seriously as a paying job. . . . They know that other student depend on them to keep to arranged schedules and to meet deadlines.); Kyle, SPS Ex. 28, paras. 6, 7 (I usually keep track of those students to whom I had recommended the program and have often been amazed by the maturity and responsibility they have developed. . . . Their greater self-esteem is shown by a new self-assured demeanor, a confident step, and a feeling that they are making a contribution to their school and their town. They become more serious-minded now that they have something in school that motivates them, and because they know that a lot of people depend upon them.); LaFayette, SPS Ex. 29, para. 6 (I have watched many students progress through the program, and I have been quite impressed with the independence and responsibility that they gain from the experience, particularly since many of these students would appear not to have excelled in other, more traditional academic pursuits.)

48. As the foregoing illustrates, the radio communications program taught a wide range of skills – from technical to interpersonal. In the opinion of Mr. Vassar, the Board's representative, this aspect of the program fulfilled a specific Board goal of providing "educational program[s] of instructional excellence wherein students are prepared for post-secondary training, higher education, the world of work, and effective functioning in present and future society" (Vassar, SPS Ex. 3, para. 15; *see also* Kyle, Tr. 2554).

49. The radio station also played a role in the achievement of some of the other educational goals and objectives set by the Board during the license renewal period. For example, the School System has had a goal of fostering community awareness and understanding of the accomplishment, achievements, and directions of the School System through a strong public relations program (Vassar, SPS Ex. 3, para. 17). Through the broadcast of programs that publicized activities and events within the School System (Vassar, Tr. 1038-1041), the radio station served as a powerful means of communicating with the population at large and particularly with those segments of the population that are difficult for the School System to reach and communicate with – teen-agers, and especially minority teens (Vassar, SPS Ex. 3, para. 17; Vassar, Tr. 1228-1231).

50. The School System has also had a goal of providing all students with equitable opportunities to learn in quality integrated schools, classrooms, and programs that are responsive to ethnic and cultural diversity and are educationally sound. Mr. Vassar testified that the radio station contributed to the accomplishment of this goal in two ways. First, the radio program is one of the transfer options in the School System's magnet or options program, which was available, by application, to all the high students in the School District. The goal of the magnet program was to help the School System to achieve an appropriate distribution of minority and non-minority students in the high schools, thereby contributing to ethnic and cultural diversity in the classrooms (Vassar, SPS Ex. 3, para. 19; *see also* Hoge, Tr. 1015-1016). In addition, KNHC responded to ethnic and cultural diversity by addressing the needs and interests of various racial and ethnic segments of the community in the programming it presented during the license renewal period (Vassar, SPS Ex. 3, para. 19; *see also* para. 128, *infra).*

Station KNHC's Performance in Meeting Community Needs

51. There were two prongs to the School System's showing with respect to how the station met the needs of the Seattle community during the license renewal period: (a) the way in which the operation of KNHC provided an educational opportunity for the young people of Seattle (*see* paras. 52-65, *infra)* and (b) the extent to which the

programming broadcast by KNHC addressed the ascertained needs of the Seattle community as a whole (*see* paras. 66-127, *infra).*

a. *Station KNHC's Educational Program*

52. A relevant issue for purposes of a renewal expectancy in the noncommercial context is whether the past operation of KNHC has served the needs of the Seattle community by providing an important and valuable educational experience. There was substantial testimony to this effect, focusing primarily on the ways in which the operation of a "real" radio station has converted what would have been an ordinary educational experience into one that is very special -- indeed, unique -- in the community.

53. Several of the School System's witnesses directly responsible for the operation of KNHC sought to distinguish between operating a full-time over- the-air broadcast facility with a substantial listening audience and what was termed "an electronic sandbox" -- a euphemism for child's play which may be educational but is nonetheless of limited lasting value (Vassar, Tr. 1232).

54. For example, T. J. Vassar, the School System's representative from the School Board and himself involved in vocational training, testified that he "believe[s] the station and the communications program with which it is associated represent unique and irreplaceable educational resources in this school district" (Vassar, SPS Ex. 3, para. 3). When asked to explain what he meant by uniqueness, he answered that KNHC has enabled the radio program to offer a "real world" learning environment with "live, hands-on radio experience" (Vassar, SPS Ex. 3, paras. 16, 20; Vassar, Tr. 1200-1201). He explained that "when you get on the air, when you actually do the job, when you're in that environment when things are happening that are unexpected and you have to react, you have to make some judgments . . .; I know how important that is for the kids' self-confidence, to motivate them to do better, and to make them feel that they are sufficiently trained to actually do the job" (Vassar, Tr. 1201). He stressed that KNHC is "the only electronic medium that [the School System] own[s] that broadcasts to a lot of people and [is] a real live vocational education laboratory." (*Id.* at 1210)

55. Gregg Neilson, the station's General Manager, offered another perspective. He observed that the operation of a live over-the-air radio station makes the communications program more effective because "interest is stimulated . . . by the fact that the students can hear themselves on the air and that prospective students can aspire to be on the air . . ." (Neilson, Tr. 888). Mr. Neilson stated that "many students have told me that [if it weren't for KNHC], they would have dropped out . . . of the program [and] out of school." (*Id.* at 889) He concluded that the existence of a "real" radio station captures the students' imagination and "motivates [them] to continue with the program." (*Id.*)

56. This testimony was corroborated by that of Jay Wang, who has taught in the communications program at Cleveland High School, the other school in the Seattle School System that has offered a program in mass communications (Wang, SPS Ex. 4, para 1). The courses offered at Nathan Hale and Cleveland have been virtually the same -- the one significant difference being that the students at Cleveland have gained their "on-air" experience by operating an in- house radio station which has been hard-wired to the school lunchroom, whereas the students at Nathan Hale broadcast over-the-air to residents of Seattle (Neilson, SPS Ex. 1, para. 21; Neilson, Tr. 811-812; Wang, Tr. 1244). Mr. Wang stated that KNHC has been an emotional and psychological focal point for Cleveland students because it is "something that they aspire to," (Wang, Tr. 1290) and "[h]aving KNHC there . . . sparks them." (*Id.* at 1293) He recounted that some of his students were on-air at KNHC and "when they came back they were like heroes . . . . [Being on the air] is different." (*Id.* at 1291) He added that since there are relatively few "intern programs available for high school age kids to go out and even work in most areas in the broadcast media," let alone programs where they "get to manage, or run, or learn how this department works and go out and do it," the opportunities provided by KNHC to the students of the Seattle School System are all the more valuable. (*Id.* at 1292-1294).

57. Mr. Wang commented that the experience of the Cleveland students who trained on their in-house station was worthwhile, but it was qualitatively different from that of the students who operated KNHC, because getting experience through an "electronic sandbox technique" is "the same thing as anybody coming out of any school of broadcasting who's never been on the air . . . . They've never been in front of the live mike. They've never had to produce something that really was going to be listened to by 40,000 people. It's still not the same when -- what it means when it's for real" (Wang, Tr. 1292). Mr. Wang further testified that "the ability to be on the air" is "the reason [KNHC] exists actually. It's to provide a real industrial situation for students in the vocational program. They have a station that's theirs, that they manage, and that they run, and that they are responsible for its sound . . . which is the way the industry is." (*Id.* at 1291-1292)

58. Other school personnel who were less directly involved in the program also testified to the special qualities of a program that includes a "real" radio station. Doris Kyle, a Nathan Hale Guidance Counselor, stated that, "[f]or the students interested in communications, we are the only station in that area that I have been aware in the time that I have been in Seattle, that gives this opportunity in broadcast" (Kyle, Tr. 2553-2554). Mrs. Kyle further stated that "there's nothing like being on air" (Kyle, Tr. 2553). Mrs. Kyle discussed the ability of the radio program to interest unmotivated students in something academic, and said she often had "steered these students toward the radio program in the hope that it would spark some interest in them and encourage them to remain in school to receive their diplomas" (Kyle, SPS Ex. 28, para. 3). Similarly, Jan Bowersox, formerly the Vice-President of the Parent Teachers Student Association and now a science teacher at Nathan Hale, testified that the radio program "acts as an incentive that often 'turns students on' to school; in many cases, the program encourages students to remain in school" (Bowersox, SPS Ex. 9, paras. 1, 2, 7).

59. Kelly Alford, KNHC's Chief Engineer, a Supervisor during after- school broadcast hours, and himself a graduate of the program (albeit before the license renewal period), testified that the "educational value of [the] radio program cannot be stressed enough [because the] students have the unique opportunity of trying this vocation 'on for size' before actually entering the work force" (Alford, SPS Ex. 5, paras. 1, 2, 8). He further stated that the "goal as a vocational education program is to prepare these students for a real, working world environment; therefore, we need our most effective and basic tool -- our radio station." (*Id.*,

para. 8). Bob Hawkins, a member of the Radio Communications Advisory Committee and a former broadcaster testified that because KNHC "broadcasts live to a real audience, and is not just 'sandbox radio,' students get professional training that enables them to directly enter the job market. Success in the program at Hale give students security, self- confidence, and a sense of accomplishment. . . . The program at Hale is a truly unique opportunity for these high school students" (Hawkins, SPS Ex. 21, para. 1, 4, 5).

60. Ron LaFayette, the Associate Dean of Instruction for Seattle Central Community College who has been familiar with KNHC since the beginning of the renewal period, stated that "KNHC is far and away the tops in public school student-operated stations . . ." (LaFayette, SPS Ex. 29, para. 1, 2, 6). And John Mangan, an instructor in the communications program at Clover Park Vocational-Technical Institute, stated that "'real' experience in the communications field is essential . . ., [and] [t]he fact that a station broadcasts to an audience is also important because students experience first- hand the kinds of pressures that inevitably accompany a job in a commercial station. KNHC offers such opportunities to students on a high school level" (Mangan, SPS Ex. 35, paras. 1, 3).

61. The special qualities of the radio program at Nathan Hale attributable to the operation of KNHC were noted by a number of public witnesses as well. Garcia Massingale, the Executive Director of Operation Improvement Foundation, became aware of KNHC when the station began to air PSAs for his organization in the late 1970s (Massingale, SPS Ex. 36, para. 1, 4). Based on his professional experience in the field of vocational training, he testified that the program helped "to keep kids in school, especially those students that don't excel in the traditional academic courses." (*Id.*, para. 5) Eddie Rye, Jr., became familiar with KNHC when the station began broadcasting PSAs for various civil rights organizations with which he was involved (Rye, SPS Ex. 48, para. 7). Shortly thereafter he produced a public affairs program for the station on the occasion of the twentieth anniversary of Martin Luther King's 1963 March on Washington for Jobs and Freedom. (*Id.*, para. 8). Mr. Rye stated that the educational value "of the School System's radio program and KNHC . . . cannot be stressed enough." (*Id.*, para. 9) He noted that "[t]he station is judged by the community like any commercial station is. We expect the same level of performance from these teen-agers, and we get it." (*Id.*) Lastly, Pam Siems, a volunteer with the National SIDS Foundation whose radiothon was broadcast on Station KNHC in early 1984, noted that the program has been successful because it "offers student valuable knowledge [in a vocation] that can be used for the rest of their lives," in addition to teaching them "to be responsible and mature adults" (Siems, SPS Ex. 51, paras. 1, 5).

62. Perhaps the best statements of the significance of operating a "real" radio station come from the students themselves. *See , e. g.*, Beatty- Yasutake, SPS Ex. 6, para. 4 (The program would not have had the same impact if we had had a 'mock studio' to work in. One of the best things about the program at Hale was that our friends listened to the station. The station was a source of pride to the school because we knew we were producing a sound comparable to the commercial stations in the area.); Higbee, SPS Ex. 23, para. 7 (The program captures the students' interest because it involves a 'real' radio station that broadcasts to the Seattle public.); Schall, SPS Ex. 49, para. 5 (My experience at KNHC was truly enhanced by the fact that the station broadcasts to a live audience. It made a huge difference to know that people were out there listening when I was on the air. This factor motivated me to strive for perfection; I wanted my peers and, even more importantly, my potential employers to hear a quality product.); Shostak, SPS Ex. 50, para. 9 (One of the most important aspects of KNHC that made the program such a valuable learning experience was that the station was a real station that broadcast live to a listening audience. When you are an announcer faced with an open microphone, you'd better know what you are going to say because you don't get a second chance. Your talent as an announcer evolves much faster than it does if you are learning to announce on a tape machine, because on a tape machine you can simply rewind the tape if you make a mistake. . . . In the radio business, it is a necessity to learn how to be a quick thinker and how to operate under pressure. There is no way to learn these things except in the atmosphere of a real station); Wilson, SPS Ex. 56, para. 6 (A lot of people in the program, including myself, got satisfaction from the fact that KNHC was a real radio station. We'd walk down the street and be treated as if we were famous because we were on the air at KNHC. We knew people listened to KNHC, and that was part of the fascination with the program.)

63. In addition to the students' sense of accomplishment, there is some objective evidence demonstrating that the program is successful – namely, the fact that students who were enrolled in the program were able to obtain jobs in the communications industry or to go on for further education. Although no comprehensive list was kept of the names or even the number of students involved in KNHC who did continue in the field (Neilson, Tr. 1472), the station's General Manager has kept a partial list of participants in the radio communications program who have obtained employment or who have pursued advanced degrees in communications-related fields, as this information became available to him through various informal channels (Neilson, SPS Ex. 80).

64. Several of the people whose names appear on that list testified on behalf of the School System to the effect that participation in the radio program prepared them to enter directly into meaningful positions in the communications industry. *See , e. g.*, Freeman (former announcer for KLKI-AM, Anacortes, Washington), SPS Ex. 19, para. 5 (My experience at KNHC led me to my first job in broadcasting. . . . I feel that my radio training also made me more marketablein any professional field.); Price (announcer for KRIZ-AM, Renton, Washington), SPS Ex. 45, para. 8 (Radio became a realistic goal for me, and was one way that I could make a success out of my life. Radio is my life, and the radio program at [Hale] was one way I knew of that would help me get the necessary experience to make it on my own.); Schall (Chief Engineer at KFFM(FM) and KMWX-AM, Yakima, Washington), SPS Ex. 49, para. 2 (During my junior year [at Hale], I applied competitively for, and was hired by, commercial stations KYYX(FM) and KXA-AM in Seattle. . . . My KNHC background was discussed before I was hired, and I was told that my prior experience was the deciding factor in my selection for the position.); Wilson (announcer for KRIZ-AM, Renton, Washington), SPS Ex. 56, paras. 5, 7 (The program gave people leads for jobs in the broadcasting business. It offered us on-hands experience, not just

classroom talk, in a field where experience is necessary before they'll let you in the door. . . . I was hired for my current job at KRIZ-AM because of my work at KNHC.)

65. Other students, who decided to pursue a career in broadcasting or a related field but chose first to obtain further education, also spoke of the benefits of the program. *See* Beatty-Yasutake, SPS Ex. 6, para. 5 (My experience at Hale exposed me to many facets of the communications field that my other classmates at the University of Washington have only read or heard about second-hand, especially on-air broadcasting and production.); Murphy, SPS Ex. 42, paras. 6-7 (I applied to the electronics program at North Seattle Community College and was accepted. I believe my experience at KNHC contributed to may acceptance.); Ross, SPS Ex. 47, paras. 1, 8 (I am a freshman at Washington State University in Pullman, majoring in Broadcast Communication and Business Administrative. . . . I am finding that my background in communications from Hale has prepared me thoroughly for college course work. . . . I am able to discuss things on the same level as the teaching assistant in [my broadcasting course] and at times have found my knowledge and experience to be superior to hers. The teaching assistant has often expressed amazement at the extent of my knowledge in the subject.); Shostak, SPS Ex. 50, paras. 1, 8 (KNHC really influenced what I want to do with my future. I currently am majoring in pre-engineering at the University of Washington. I first became interested in electrical engineering while working at KNHC . . . .)

b. *Station KNHC's Issue - Responsive Programming*

66. For purposes of this proceeding, the School System prepared and submitted a study of its nonentertainment programming – including public affairs, news and sports programs, public service announcements, and other nonentertainment programming – based on an analysis of the programming presented in the first and third full broadcast weeks (Sunday through Saturday) of each month from February 1981 through January 1984[8] (Neilson, SPS Ex. 57, at 1). The study was based on "sample logs," admitted as exhibits in this proceeding, which were prepared by extracting from the station's program logs the information with respect to all of the station's nonentertainment programming (including date, day of the week, title of the program, source, start time, and duration) during the sample weeks. (*Id.* at 2) Based on the programming identified in the sample logs, the School System prepared a narrative description of its nonentertainment programming, including issue- responsive public affairs programming, presented in each school year since the start of the license renewal period (Neilson, SPS Ex. 57, Attachments A-F). The School System also submitted its annual and quarterly Issues/Programs lists for the same period (Neilson, SPS Ex. 57, Attachment G, "Station KNHC Issues/Programs Lists from October 1980 through September 1986.)

i. *Station KNHC's Public Affairs Programming*

67. Throughout the license renewal period, KNHC ascertained the needs and interests of the residents of Seattle. Among other things, the instructor of the communication courses, and later the General Manager of the station, participated in regularly scheduled (typically monthly) group ascertainment meetings organized by Seattle's commercial television stations (Neilson, SPS Ex. 1, para. 33; Neilson, Tr. 893, 1446). The television stations rotated responsibility for organizing the meetings, which included inviting community leaders who could identify issues of concern to the community in such areas as minority affairs, education, law enforcement, and the like (Neilson, SPS Ex. 1, para. 33; Neilson, Tr. 893). As many as 12 community leaders would be invited to attend each meeting (Neilson, Tr. 894-895). Students occasionally accompanied KNHC's General Manager to these meetings (Neilson, SPS Ex. 1, para. 33).

68. Based on notes taken during these meetings (Neilson, SPS Ex. 1, para. 33), the station's student Public Affairs Director compiled a list of the top ten or more issues of concern to the residents of Seattle and surrounding communities (Neilson, SPS Ex. 1, para. 35; Neilson, Tr. 894). This list was used by the students to select topics for the public affairs programs they were required to produce. (*See* Neilson, Tr. 894) The list of issues also provided the basis for the station's Issues/Programs lists, which were required to be submitted annually to the Commission and now are to be prepared quarterly and retained in the station's files (Neilson, SPS Ex. 1, para. 35). The station also commissioned a telephone survey of the general public during the license renewal period, which confirmed the results of the community leader surveys (Neilson, Tr. 1436-1440).

69. Based on its ascertainment efforts, KNHC broadcast programming responsive to the needs of the community. (*See* paras. 70-127, *infra)* The majority of the responsive programs were logged as public affairs programs. This category can in turn be divided into (a) those produced by KNHC (or affiliated institutions) (hereafter referred to as "KNHC-produced" or "locally produced); or (b) so-called "institutional" (pre-recorded "network) programs produced by others. Within each category there are both long (*i. e.*, over 10 minutes' duration) and short (*i. e.*, 30 seconds to 10 minutes' duration) programs. The following findings describe most of the programs that were carried in the sample weeks during some or all of the license renewal period in each of the two categories, with the long programs discussed first and the shorter ones thereafter. Several of the programs were repeated in the course of the series. The dates provided are the first and last dates that the program was carried *within* the license renewal period (February 1981 to February 1984).

(a) *KNHC - Produced Public Affairs Programs*

70. *Action Line* – Produced by KNHC, this live public affairs program began in October 1983 and continued through the license period (Alford, SPS Ex. 5, para. 5; Neilson, SPS Ex. 57, at 68). Initially, the program was hosted by Kelly Alford, the station's Chief Engineer and KNHC graduate, who would discuss controversial subjects with guest speakers, with call-ins from the listening audience (Alford, SPS Ex. 5, paras. 1, 5); Neilson, SPS Ex. 57, at 68). Students were involved in many aspects of the program, including discussing and selecting topics with the host, lining up guests, researching and writing summaries of the issues, performing the technical functions during the program, and screening the telephone calls during the show with the use of a tape-delay machine. (*Id.*) The program, broadcast on Sunday evenings at 5:00 p.m., began as a 1-hour program and was expanded to 3 hours to accommodate the call-ins (Neilson, Tr. 802). Some of the topics discussed were abortion and nuclear disarmament (Shostak, SPS Ex. 50, para. 4).

71. *Beyond Our Shores* – Produced by KNHC and the University of Washington, this 30-minutes public affairs program focused on a variety of international issues from four regions of the world – East Europe, East Asia, South Asia, and the Near East (Neilson, SPS Ex. 57, at 7). The program was developed by the station's present General Manager, Gregg Neilson, who was at that time an instructional assistant in the radio communications program. (*Id.* ; Neilson, SPS Ex. 1, paras. 4-5.) The series, which ran from February 1981 through January 1982, aired on Wednesday evenings and was hosted by a member of the University of Washington Faculty (Neilson, SPS Ex. 57, at 8, 43).

72. *Chinese Radio Program* – Produced and hosted by the students of Cleveland High School, this 30-minute public affairs program was broadcast in Chinese (Cantonese or Mandarin) and focused on the Cultural, social, and educational needs of Seattle's large Chinese community (Neilson, SPS Ex. 57, at 10). The program featured interviews with prominent local Asian community leaders, announcements of local events in the Asian community, and Chinese music. (*Id.*) The program aired from February 1981 to October 1981, usually twice weekly, on weekdays at 6:00 p.m. (*Id.* at 10, 44)

73. *Mid - East International* – Produced by Walid Farhoud in the studios of KNHC (*see* Farhoud, SPS Ex. 16), this 30-minute program consisted of a mix of elements – about eighty percent philosophical and cultural readings in Arabic and Arabic music and about twenty percent "hard" issues (Neilson, SPS Ex. 57, at 26). The purpose of the program was to address the needs and interests of Seattle's large Arab community. (*Id.*) The topics were selected by Mr. Farhoud through consultations with leaders of the different Arabic- speaking communities in Seattle. (*Id.*) The program usually addressed both sides of the issues under discussion. It was aired throughout most of the license renewal period, generally on Mondays at 7:00 p.m. (or Fridays at 7:00 m. or 3:00 p.m. in later years). (*Id.* at 26, 53, 65).

74. *Spanish American Hour* - Produced by KNHC and sponsored jointly with Seattle Central Community College, this public affairs program focused on matters of interest to Seattle's Hispanic community (Neilson, SPS Ex. 57, at 35). Most segments of the program were in Spanish, with some segments in English. The program included interviews with leaders of the Hispanic community, music, news, general interest stories, and eventually a segment aimed at children. (*Id.*) The program began as a weekly, 30-minute program but was expanded in April 1981 to 60 minutes. It was carried through the summer of 1982. (*Id.* at 34, 55).

75. *KNHC Public Affairs* – Written and taped by students in the radio program, these public affairs program featured a wide variety of topics and issues of importance to the Seattle community (Neilson, SPS Ex. 57, at 21). The students were responsible for selecting a topic, conducting the necessary research, writing the script, and taping the program. (*Id.*) Although many of these programs addressed ascertained needs and interests, the students were not confined in their topic selection to the issues list. Topics covered by the student programs included special events or attractions for the Seattle community, advanced educational opportunities, crime and drug problems, environmental concerns, and public health issues. (*Id.* at 21-22). The student programs were generally broadcast daily Monday through Friday and ranged in length from 1 to 9 minutes, with the majority being 3 to 3 1/2 minutes long. The series ran (with some interruptions) from February 1981 to November 1982. (*Id.* at 21, 49, 64).

76. *Community Calendar / KNHC Local Events* – Produced for the most part by the students of KNHC, this series was designed to inform the listening audience about cultural and other entertainment events in the Seattle Community (Neilson, SPS Ex. 57, at 12). Theater, concert, movie, and museum events were regularly featured. (*Id.*) The program was broadcast in the first and last years of the license renewal periods on weekdays, and ranged in length from 1 1/2 to 5 minutes. (*Id.* at 12, 44).

77. *Briefs About Business* – Sponsored by Seattle Central Community College, this program was produced by an instructor of accounting at Seattle Central Community College who wrote and taped summaries of business information of interest to the general public derived from the Wall Street Journal and other business publications (Neilson, SPS Ex. 57, at 8). Topics included employee insurance plans, the effect of federal budget cuts, the future of various career paths, and international money matters. (*Id.* at 9). The program was carried from March to July 1981, on Tuesday and Thursday evenings, and ranged in length from 2 to 8 minutes. (*Id.*)

78. *Communique from SCCC* – Produced by Seattle Central Community College, this series of public affairs programs offered information on current programs and courses offered by the college, upcoming events, student and faculty awards, and local issues facing the college (Neilson, SPS Ex. 57, 12). The series was carried during the period February to June 1981 and was usually broadcast on weekdays; the program was typically 5 minutes in duration. (*Id.*)

79. *What's Happening in the Schools* ? – Produced by KNHC, this program featured Seattle School Board member T. J. Vassar (Neilson, SPS Ex. 57, at 58-59). Mr. Vassar interviewed various school program and department heads concerning their areas of responsibility. Topics included the School System's full-funding litigation (*see* para. 141, *infra),* desegregation plan, student achievement, vocational competency, and test scores (Neilson, SPS Ex. 57, at 58-59). The series was broadcast from June 1982 to October 1983 and was carried on most Saturdays during the 11:00 a.m. hour; the program segment lasted for 5 to 15 minutes. (*Id.* at 58-59, 66, 80)

(b) *Institutional Public Affairs Programs*

80. *Black Beat* – Produced by the Southern Baptist Radio and Television Commission, this 30-minute recorded nondenominational program featured black entertainment artists and addressed moral issues facing primarily youth and minorities (Neilson, SPS Ex. 57, at 60). The program was usually broadcast on Wednesdays at 6:00 p.m. and was carried during the spring of 1983. (*Id.*)

81. *Black Report* – Sponsored and produced in Seattle by Puget Sound Recreation Club, this 1-hour live public affairs program was primarily aimed at the black community (Neilson, SPS Ex. 57, at 43). It was presented in a magazine format, offering news, sports, commentary, feature stories, and local church and public service announcements, as well as entertainment of particular interest to the black community. The show was broadcast on Saturdays at noon, and was carried from March to August 1982. (*Id.*)

82. *Israel Magazine / Israel Press Review* – Sponsored by the Office of the Israel Consulate General, New York, these recorded program provided information to Seattle's Jewish community (Neilson, SPS Ex. 57, at 20). "Israel Magazine" discussed the arts and offered topical commentary. The program aired on Tuesdays or Thursday and ranged in length from 9 to 30 minutes. (*Id.*) "Israel Press Review" discussed news developments in Israel and the Middle East and also offered commentary. The program aired on Wednesday evenings and ranged in length from 10 to 14 minutes. (*Id.* at 21) Both programs were carried from February 1981 to August 1982. (*Id.* at 20-21, 49)

83. *Longhorn Radio Network* – Sponsored by the University of Texas and produced by the Longhorn Radio Network, this recorded public affairs series consisted of two programs: "Consider the Alternatives" and "Focus" (Neilson, SPS Ex. 57, at 23-24). Both programs addressed issues of national importance such as the environment, urban industry, public housing, the use of the military abroad, and U.S. relations with other countries. (*Id.*) "Consider the Alternatives" usually aired on Wednesdays at 4:00 p.m. and ranged in length from 27 to 30 minutes. "Focus" usually aired on Tuesdays at 4:00 p.m. and was 29 minutes in length. The two series were carried from February to June 1981. (*Id.* at 23)

84. *Man and Molecules* – Sponsored by the American Chemical Society, this recorded program discussed in lay terms a wide variety of topics relating to science and medicine. Topics included the theory of evolution, exploring outer space, solar power, recombinant DNA, medicine and disease, and energy research (Neilson, SPS Ex. 57, at 24-26, 51). The series was carried from February 1981 to January 1983 on weekdays; the program segments were 13 to 15 minutes long. (*Id.* at 25, 51, 64)

85. *Science in the News* – Sponsored by the Washington State University Tape Network, this recorded program explored a wide variety of energy-related scientific issues and theories (Neilson, SPS Ex. 57, at 32-33). The series was carried from February to June 1981 on weekday afternoons; the program segments were roughly 15 minutes in length. (*Id.* at 32)

86. *Sounds of Listen* – Sponsored by Narcotics Education, Inc., this 15-minute recorded public affairs program focused on youth health issues (Neilson, SPS Ex. 57, at 33). Topics included keeping physically fit, friendships, effects of drug use and abuse, preparation for marriage, pregnancy, alcoholism, and dealing with stress. (*Id.* at 33-34) Each program generally addressed several such issues. (*Id.* at 33) The program was carried from February to August 1981 on weekday mornings. (*Id.*)

87. *U. S. Public Policy Forum* – Sponsored by the American Enterprise Institute, this recorded public affairs program sought to inform the public on current U.S. legislative policies and other issues of national importance (Neilson, SPS Ex. 57, at 39). Topics included inflation in the U.S. and abroad, the role of the judiciary, foreign intelligence, the U.S. economy, and U.S. defense. (*Id.*) The program aired on Fridays at 4:00 p.m., lasted 58 minutes, and was carried from April to August 1981. (*Id.*)

88. *Women Break Through* – Sponsored by the Intercollegiate Broadcasting System, this recorded public affairs program dramatized the issue of women in today's job market (Neilson, SPS Ex. 57, at 40). The program was carried from March to May 1981 on weekdays at 2:40 p.m.; the program segments ranged in length from 11 to 15 minutes. (*Id.*)

89. *American Physical Fitness* –Sponsored by the American Physical Fitness Research Institute, this recorded public affairs program addressed issues of health and physical fitness (Neilson, SPS Ex. 57, at 5). Topics included low blood sugar, drug interaction, the aging process, and proper eating habits. (*Id.*) The program aired on weekday afternoons, was 4 to 5 minutes in length, and was carried from April to May 1981. (*Id.*)

90. *Aware* – Produced by the Seventh Day Adventists, this nondenominational recorded program dealt with such issues as boredom, anger, and depression (Neilson, SPS Ex. 57, at 69-70). The programs were broadcast during the 2:00 p.m. or the 5:00 p.m. hour, lasted 30 to 60 seconds, and were carried from September to November 1983. (*Id.*)

91. *Blacks Before America* – This recorded series focused on the historical role of blacks in Western and Eastern civilization (Neilson, SPS Ex. 57, at 60-61). The programs were broadcast on various days and at various times, lasted for one minute, and were carried during the spring and summer of 1982, and the fall of 1983. (*Id.* at 60-61, 71-72)

92. *Business of Being a Baby* – Sponsored by Seattle Central Community College and produced by the Harvard Lilly Program for Parent Education, Lafayette, Indiana, this recorded program focused on the issue of child development (Neilson, SPS Ex. 57, at 9). The program aired on weekdays, usually lasted 2 minutes, and was carried from February to September 1981. (*Id.* at 10, 44)

93. *Cornell University* – Produced by Cornell University, this recorded public affairs program focused generally on national concerns and usually employed an interview format (Neilson, SPS Ex. 57, at 12). Topics included the U.S./Soviet arms race, the oil crises, disease research, alcoholism, NATO, sex discrimination, and international relations. (*Id.* at 13, 44-45, 61-62, 72) The program aired on weekdays, usually lasted 5 minutes, and was carried throughout the license period. (*Id.*)

94. *Energy Watch* – Sponsored by the Edison Electrical Institute, this recorded public affairs program focused on environmental issue (Neilson, SPS Ex. 57, at 14-15). Topics included gasohol, fusion, nuclear waste, heating with wood and coal, microwave ovens, wind power, and energy conservation. (*Id.*) This program aired on weekdays, lasted 3 minutes, and was carried from February 1981 to June 1982, and November 1982 to March 1983. (*Id.* at 14-15, 45-46, 62)

95. *Everybody Can Be Somebody* – Sponsored by the Faiser Corporation, this recorded public affairs program discused the role of the small businessperson, how to succeed in business, and other employment-related topics (Neilson, SPS Ex. 57, at 15). The program aired on weekdays, lasted one minute, and was carried from March to July 1981. (*Id.* at 16)

96. *Farm and Foods Program* – Sponsored by the Washington State University Tape Network, this series of recorded programs discussed such topics as how to grow your own food, foods and health, consumer shopping, and current farm information (Neilson, SPS Ex. 57 at 16). The series was carried from February to August 1981 on weekdays at 10:00 a.m.; the program segments ranged in length from 1 to 5 minutes. (*Id.* at 16-18)

97. *For Your Information* – Sponsored by Carl Byoir, this recorded program provided information on a variety of issues (Neilson, SPS Ex. 57, at 62). Topics included urban development, energy costs, higher education, and

interest rates. (*Id.* at 63) The program was broadcast on weekday afternoons, lasted between 3 and 4 minutes, and was carried during August and November 1983. (*Id.* at 62-63, 73-74)

98. *Forest Productivity* – This recorded program dealt with issues of forest productivity, conservation, and preservation (Neilson, SPS Ex. 57, at 63). The program was broadcast on weekdays during the 2:00 p.m. hour, ranged in length from 4 to 5 minutes, and was carried from March to May 1983. (*Id.*)

99. *Health File* – Sponsored by the Seventh Day Adventist Church, this nondenominational recorded public affairs program focused on health issues, primarily preventive health care (Neilson, SPS Ex. 57 at 18). Topics included the importance of exercise, insomnia, childhood diseases, skin diseases, emotions, and dental health. (*Id.* at 18-20, 46-47) The program aired during the 10:00 a.m. hour on weekdays, lasted for 4 1/2 minutes, and was carried from February 1981 to March 1982. (*Id.* at 18-19, 46)

100. *Hemispheres* – Sponsored by the Tinker Foundation and the International Communications Agency, this recorded public affairs program offered insight into Latin American issues of international, national, and local importance (Neilson, SPS Ex. 57, at 48). The program was usually broadcast Monday through Friday between 10:35 a.m. and 10:40 a.m., was 4 1/2 minutes long, and ran during most of the 1981-1982 and some of the 1982-1983 school year. (*Id.* at 48-49, 64)

101. *Labor News and Views* – Sponsored by the United Black Postal Workers' Union, this 5- to 10-minute recorded program focused on national political issues from the black perspective (Neilson, SPS Ex. 57, at 50). Topics included arms control, the NCAA, the cost of higher education, the role of blacks in industry, and the possibility of a black president. (*Id.* at 74- 75) The program was broadcast weekdays during the 9:00 a.m. hour (or around noon) and was carried in the first and last years of the license renewal period (*Id.* at 50, 74-75)

102. *NASA* – Sponsored by the National Aeronautical and Space Administration, this recorded public affairs series featured programs pertaining to scientific issues of current interest such as space exploration, and current NASA plans and experiments (Neilson, SPS Ex. 57, at 28-30, 54-55, 65-66, 78-79). The program aired throughout the license period on weekday afternoons; the program segments ranged in length from 1 to approximately 15 minutes. (*Id.*)

103. *Popular Science* – This recorded program was designed to inform the audience about different aspects of science, such as research, discoveries, and technological advances (Neilson, SPS Ex. 57, at 66). The program was broadcast on weekdays usually during the 5:00 p.m. hour, lasted between 1 and 3 minutes, and was carried from June to October 1983, and in January 1984. (*Id.* at 66, 79-80)

104. *Spot News* – Sponsored by Carl Byoir and Associates, New York, this recorded public affairs program addressed various issues, including health concerns (both physical and mental), energy conservation, office productivity, financing small businesses, and inflation (Neilson, SPS Ex. 57, at 36-38, 56- 58). The program aired on weekdays between 11:00 and 11:30 a.m, ranged in length from 1 to 4 minutes, and was carried from February 1981 to March 1982. (*Id.*)

105. *Washington Report with Senator Slade Gorton* – Produced by U.S. Senator Gorton's office, this public affairs program focused on a variety of issues of importance to the people of the State of Washington (Neilson, SPS Ex. 57, at 66-67). The program was carried from July 1983 to February 1984 on Tuesdays or Thursdays, usually during the noon hour; the program segments lasted between 1 and 4 minutes. (*Id.* at 66-67, 80)

106. *Working in the Sighted World* – Sponsored by the American Federation for the Blind, this recorded public affairs program discussed the problems faced by blind people in adjusting to the sighted world (Neilson, SPS Ex. 57, at 40-41). The program aired on weekday afternoons, lasted 4 1/2 minutes, and was carried from February to May 1981. (*Id.*)

ii. *Station KNHC's Other Nonentertainment Programming*

107. *News and Sports* – Produced by the students of KNHC, these 4- to 5-minute programs aired throughout the school day, varying from several times a day to hourly (Neilson, SPS Ex. 58-61 *passim).* Generally speaking, there are very few entries for news after the 2:00 p.m. hour on weekdays, or on weekends or holidays. (*See* Neilson, Tr. 780-781) This correlates with the fact that virtually all of the station's news programming during the license period was produced by students in the news department, most of whom leave the premises at the end of the school day. (*See Neilson*, Tr. 781-782)

108. *PSAs* – A great many local, regional and national public service organizations, governmental departments and agencies, and colleges and universities provided PSAs (on tape or by script) for broadcast on KNHC during the license period (Neilson, SPS Ex. 1, para. 42; *see also* Neilson, SPS Exs. 58-61) *passim).* Some typical and illustrative agencies which provided PSAs to KNHC during the license renewal period were: Alcoholics Anonymous, American Cancer Society, American Heart Association, American Red Cross, CARE, King County (Seattle) Extension Services, King County (Seattle) Library System, Parent Teacher Student Association, Puget Sound League of Women Voters, Seattle Aquarium, Seattle Area Association of Black Accountants, Seattle Central Community College, Seattle Children's Theater, Seattle City Attorney, Seattle Commuter Pool, Seattle Consumer Action/Protection Network, Seattle Parks Department, Tacoma Youth Symphony, UNICEF, United Way, Washington Lung Association, Washington State Art Commission, and West Seattle Mental Health Center (Neilson, SPS Exs. 58-61 *passim).*

109. From February 1981 to August 1981, KNHC broadcast PSAs for approximately 70 of these or similar organizations. (*See* Neilson, *SPS* Ex. 58 *passim)* During the 1981-1982 school year (September 1981 to August 1982), KNHC broadcast PSAs for approximately 100 such organizations, including approximately 50 that had not been carried on KNHC in the previous year. (*See* Neilson, SPS Ex. 59 *passim)* During the 1982-1983 school year, KNHC broadcast PSAs for approximately 120 organizations, including approximately 65 that had not been carried on KNHC in the previous year. (*See* Neilson, SPS Ex. 60 *passim)* From September 1983 to February 1984, KNHC broadcast PSAs for approximately 65 organizations, including approximately 30 that had not been carried on KNHC in the previous year (Neilson, SPS Ex. 61 *passim).*

110. *Other Nonentertainment Programming* – In addition to the programming described above, KNHC broadcast a variety of other nonentertainment programs, including the following:

111. *American Gardener* - This 1-minute recorded program offered tips and helpful hints for the home gardener, and was sponsored by the National Garden Bureau (Neilson, SPS Ex. 57, at 42). The series was generally broadcast weekdays at 8:30 a.m., although occasionally it was broadcast at 12:30 p.m.; it ran from March to June 1982. (*Id.*)

112. *Astrofecha / Star Date* – Produced by the Longhorn Radio Network, University of Texas, Astrofecha was a 2-minute program about astronomy aired on weekday mornings and broadcast in Spanish. This series was carried from February to March 1981 (Neilson, SPS Ex. 57, at 5-6). Star Date, the English equivalent of Astrofecha, was also aired on weekday mornings. This series was broadcast from September through December 1981. (*Id.* at 58)

113. *Audio News Features* – Sponsored by Sheridan Elson Communications, this program consisted of 2- to 4-minute features on topics such as retirement, having children, and beauty tips. The series was broadcast on weekdays and was carried off and on throughout the license period (Neilson, SPS Ex. 57, at 6-7, 42-43, 60, 69).

114. *Gospel Music Program* – In June of 1982, KNHC began to produce a 2-hour contemporary Gospel music program hosted by Alfred Taylor (*see* Taylor, SPS Ex. 54) on Sunday mornings, beginning either at 8:00 a.m. or 9:00 a.m. (Neilson, SPS Ex. 57, at 46). This program introduced the Seattle community to contemporary Gospel music and also provided local church announcements. (*Id.* ; Taylor, SPS Ex. 54, paras. 4, 10) Beginning in September 1983, the program ran for six hours (Neilson, SPS Ex. 57, at 74). The program was carried from June 1982 to February 1984. (*Id.* at 46, 63, 74)

115. *Horizontes* – Sponsored by the Southern Baptist Radio and Television Commission, this 30-minute recorded nondenominational program was broadcast in Spanish. It featured music as well as sociological and cultural issues of interest to Latin Americans (Neilson, SPS Ex. 57, at 48-49). The program was broadcast on Thursday evenings at 7:30 p.m. and was carried from September 1981 to March 1982. (*Id.*)

116. *Let's Talk* – Sponsored by the Washington State University Tape Network, this 28-minute program addressed a number of human interest topics such as music, languages, and education. The series was usually broadcast on Mondays at 4:00 p.m. and was carried from February to June 1981 (Neilson, SPS Ex. 57, at 22-23).

117. *Local Military Recruit of the Day* – During the 1981-1982 holiday session, KNHC broadcast many of these 45-second messages from Seattle area servicemen and servicewomen (Neilson, SPS Ex. 57, at 51). The tapes were received from local military recruiting offices (Army, Navy, and Air Force), and after airing, the tapes were sent to the families of the servicemen and women whenever possible. (*Id.*)

118. *One Minute Thoughts for Each Day* – Produced by the Christophers, New York, these 1-minute nondenominational programs offered commentary on a variety of societal issues such as kindness to others, self- help, and crime. The series was broadcast weekdays, usually early in the morning, and was carried from February to August 1981 (Neilson, SPS Ex. 57, at 10-11)

119. *Mother Earth News* – This 3-minute program covered a wide variety of topics, including gardening, cooking tips, energy conservation, and ecology. The series was broadcast on weekdays, usually in the afternoon, and was carried from February 1981 to November 1983 (Neilson, SPS Ex. 57, at 26-28, 53, 65, 77).

120. *Pets and Vets* – Sponsored by the Washington State University Tape Network, this 4-minute program discussed animal husbandry and pet care (Neilson, SPS Ex. 57, at 30-31). The program was broadcast weekdays at 1:00 m. and ran from February to June 1981. (*Id.*)

121. *Radio Nederland* – This weekly program featured Dutch music and arts and ranged in length from 23 to 35 minutes (Neilson, SPS Ex. 57, at 31- 32). The program was carried from February to April 1981 on Sundays either at 9:00 a.m. or 3:00 p.m. (*Id.*)

122. *Tips for Home Gardeners* – Sponsored by the Bedding Plant Institute, this 1 3/4-minute program covered a variety of gardening topics. The series was broadcast on weekdays, usually at 8:10 a.m., and was carried from April to June 1981 (Neilson, SPS Ex. 57, at 38-39).

123. *What In the World Happened* – Sponsored by the U.S. Navy, this 1-minute program broadcast weekdays in February 1981 at approximately 8:00 a.m. looked at an event that occurred on the same date in history (Neilson, SPS Ex. 57, at 40).

124. *The Word* – Sponsored by Unity Village, this 1-minute nondenominational recorded program centered around a given word for each day (Neilson, SPS Ex. 57, at 59). The theme of the particular word for the day was developed through inspirational messages. (*Id.*) The program was usually broadcast on weekdays between 8:00 a.m. and 8:15 a.m. and was carried from March 1982 to February 1984. (*Id.* at 59, 67, 80-85)

iii. *Analysis of Station KNHC's Nonentertainment Programming*

125. The School System presented a descriptive, rather than quantitative, analysis of its nonentertainment programming. The descriptions provided establish the breadth of KNHC's nonentertainment programming, as well as the fact that this programming was responsive to the ascertained needs and interests of the Seattle community.

126. The School System also submitted KNHC's Issues/Programs Lists for the license renewal period (Neilson, SPS Ex. 57, Attachment G; *see also* Neilson, Tr. 1437-1439, 1443-1445). These lists reflects that the station consistently identified, through the ascertainment process, at least 10 issues of concern to the community, which it ranked in descending order of importance (Neilson, SPS Ex. 57, Attachment G; Neilson Tr. 1437). The lists also set forth typical and illustrative (but not exhaustive) programming aired by KNHC in response to the ascertained issues (Neilson, SPS Ex. 57, Attachment G; Neilson, Tr. 1442-1443), which is further support for the finding that KNHC's programming served the needs of the community.

127. In addition, as is evident from the preceding findings, KNHC aired its issue-responsive programming throughout the broadcast day, including periods of high listenership, rather than relegating them to so-called ghetto blocks of time (Neilson, SPS Ex. 57, at 125; *see* Neilson, Tr. 899, 905). Moreover, KNHC gave special emphasis in its nonentertainment programming to programs directed to its target audience – namely, teens and young adults, and minorities. Programs (other than PSAs) of special

interest to youth that are described above included "KNHC Public Affairs" (para. 75); "Community Calendar/Local Events" (para. 76); "Communique from SCCC" (para. 78); "What's Happening in the Schools?" (para. 79); "Black Beat" (para. 80); and "Sounds of Listen" (para. 86). Programs (other than PSAs) directed at minorities included "Black Beat" (para. 80); "Blacks Before America" (para. 91); "Black Report" (para. 81); "Chinese Radio Program" (para. 72); "Gospel Music Program" (para. 114); "Hemispheres" (para. 100); "Horizontes" (para. 115); "Israel Magazine/Israel Press Review" (para. 82); "Labor News and Views" (para. 101); "Mid-East International" (para. 73); and "Spanish American Hour" (para. 74).

3. *Other Factors Supporting the School System's Renewal Expectancy*

128. The School System submitted evidence on other factors in support of its renewal expectancy, including (a) community support for KNHC's programming; (b) mechanisms for involving the community in the radio communications program; and (c) the actions of the School Board during the license renewal period with respect to the station's hours of operation.

a. *Community Support for Station KNHC's Programming*

129. Community support for the School System's operation of KNHC was reflected in the testimony of a number of public witnesses, who praised the station's programming efforts during the license renewal period. For example, Walid Farhoud, the producer of "Mid-East International" (*see* para. 74, *supra),* testified that KNHC offered an invaluable community service through its responsive programming directed at minorities (Farhoud, SPS Ex. 16, paras. 5, 7). Mr. Farhoud stated that "KNHC gave me the opportunity to educate the Arabic population of Seattle [about current events in their homelands] by allowing me to broadcast programs in their [native] languages." (*Id.*, para. 7) Mr. Farhoud also testified that he "much prefer[red] KNHC's format and presentation of issues of importance" to that of another station in the market on which he had appeared. (*Id.*, para. 8) Among other things, according to Mr. Farhoud, the other station, but not KNHC, required him to broadcast in English and to present only one side of a controversial issue. (*Id.*)

130. Harold Monsen, who participated in the production of "The Chinese Hour" (*see* para. 72, *supra),* testified that KNHC perceived a need for programming for minority students as well as the adult minority population and did something about it (Monsen, SPS Ex. 41, paras. 2, 3). Specifically, Mr. Monsen testified that Seattle is home to the Nation's third-largest Asian population, most of whom speak Chinese languages (either Mandarin or Cantonese), and that there was a real need to reach "ever-increasing numbers of minority students as well as the adult minority population, in their native language." (*Id.*) "The Chinese Hour" met this need by broadcasting, in Mandarin or Cantonese, information, news, and music of particular interest to Seattle's Asian population. (*Id.*, para. 3) The needs of the Asian audience were determined through interviews with local Asian leaders about political, social, cultural, and educational issues of local concern. (*Id.*)

131. Eddie Rye, Jr. is a Seattle resident who testified that he has devoted himself "to making life better and more equitable for Seattle's Black population and to increasing understanding between Blacks and whites in Seattle" (Rye, SPS Ex. 48, para. 1). Mr. Rye has served on the boards of directors of many public service organizations in Seattle, including the Seattle Urban League and the Central Seattle Boys Club. (*Id.*, para. 3). As noted above (para. 61), Mr. Rye testified that, during the license renewal period, KNHC "broadcast many PSAs on behalf of [the public service] organizations I am involved with and also aired public affairs programs that I produced," on matters of particular interest to Seattle's Black population. (*Id.*, para. 7) In Mr. Rye's opinion, KNHC provided "a valuable community service by broadcasting programs covering a broad spectrum of community issues," and the station's attitude was such that "whenever I had a program to air on matters of interest to the Black community, I would first approach KNHC." (*Id.*, para. 9).

132. Alfred Taylor, an announcer at Seattle radio station KKFX, testified that KNHC met the cultural needs of the Black community through the broadcast of a gospel music program, which he produced and hosted during the license renewal period (Taylor, SPS Ex. 54, paras. 1, 6; *see* para. 114, *supra).* According to Mr. Taylor, during the period 1981-1983, "KNHC had the only Black- oriented music in the community, and the Gospel show especially brought the black community together" (Taylor, SPS Ex. 54, para. 6). In his opinion, the gospel program also served the needs of the Black audience by airing local church announcements. (*Id.*, para. 5)

133. Garcia Massingale is the founder and Executive Director of Operation Improvement Foundation, a 20-year old Seattle organization that funds vocational training for qualified low income and/or unemployed individuals (Massingale, SPS Ex. 36, paras. 1, 2). For most of his professional career, Mr. Massingale has been involved with the problems of young people. (*Id.*, para. 2) As noted above (para. 61), since the late 1970s, KNHC has aired many PSAs for Operation Improvement. Mr. Massingale testified that many applicants for Operation Improvement funds have told him that they learned about the program by listening to KNHC (Massingale, SPS Ex. 36, para. 4). Mr. Massingale also testified that KNHC is a particularly good forum for his organization's PSAs, which are targeted at high school students, because so many young people listen to KNHC. (*Id.*)

b. *Community Outreach and Involvement*

134. The School System employs several mechanisms for involving members of the community in the radio communications program, most notably the use of adult volunteers for evening air shifts, the PIPE (Private Initiatives in Public Education) program, and the Radio Communications Advisory Committee (Neilson, SPS Ex. 1, para. 63).

135. As noted above (para. 43), the station has a policy of using adult volunteers as announcers for air shifts after 8:00 p.m. on weekdays so that the student have their evenings free for homework and to get a good night's sleep (Neilson, SPS Ex. 1, para. 64). Although the on-air voice is that of an adult volunteer, the programming that is broadcast has been selected and/or taped by the students, who are also responsible for the preparation of logs for these late evening shifts. (*Id.*) Most of the adult volunteers have had prior broadcast experience. (*Id.*) In any event, before they can go on the air, the volunteers must submit an acceptable audition tape or air check and be interviewed by the General Manager. (*Id.*, para. 65). The volunteers come to the station unsolicited and are not compensated for their efforts. (*Id.*, paras. 65-66) Yet they

perform an important function in the program by setting an example for the students to emulate (or criticize, where warranted) and by listening to and providing critiques of the students' on-air performances. (*Id.*, para. 64).

136. The station also involves the community through the PIPE program, the purpose of which is to integrate the business community into the School System's programs for their mutual benefit (Neilson, SPS Ex. 1, para. 67). Each high school generally has one or two PIPE partners. (*Id.*) During the license renewal period, Nathan Hale's principal PIPE partner was SAFECO Insurance Company, which provided equipment for and assistance in constructing a news set for the communications program's television studio. (*Id.* ; Neilson, Tr. 663) In addition, the radio program had ongoing relationships during this period with the three major network-affiliated stations in Seattle (KING, KIRO, and KOMO), which provided equipment and lecturers for the program (Neilson, Tr. 662-2664). These relationships were formalized and officially integrated into the PIPE program shortly after the license renewal period ended. (*See infra)*

137. The station's Radio Communications Advisory Committee draws participants from a variety of fields, including broadcasting, engineering, and public relations (Neilson, SPS Ex. 1, para. 68). The classroom side of the radio communications program has always had an Advisory Committee, but when Mr. Neilson became General Manager in 1983, he expanded the scope of the Committee's work to include the radio station as well. (*Id.*) The Committee has met twice a year to review the radio communications program, including curriculum and station operations, and to recommend changes in the program. (*Id.*) Thus, for example, the Commission was instrumental in recommending changes in the station's policies regarding fundraising events and underwriting credits and in helping the station to develop and refine its dance music format to achieve a distinctive and professional sound. (*Id.*)

c. ***School Board Actions with Respect to Station KNHC's Hours of Operation***

138. One other aspect of KNHC's performance during the license renewal period warrants discussion – namely, its hours of operation. Throughout the period, applicable Commission Rules provided that if a station operated less than 84 hours per week, it was vulnerable to the Commission's imposing a time-sharing arrangement upon the filing of an appropriate application requesting such an arrangement. 47 CFR Section 73.561(b). There was a seven-month period (from September 1982 to April 1983) when KNHC averaged 70 hours per week –somewhat less than the 84-hour minimum (Neilson, SPS Ex. 1, para. 25). Although the station consistently broadcast 84 hours a week both before and after this short period (other than occasional instances when the broadcast day was cut short because of technical difficulties) (Neilson SPS Ex. 1, para. 25 & Attachment D), and although a separate issue regarding the station's operating hours was not designated in either the original or the revised HDO, the School System submitted testimony on the circumstances leading to the temporary reduction in hours as well as the decision to increase the hours.

139. The circumstances leading to the reduction in the operating hours were described in detail by Thomas Hodgson, the Director of Vocational Education during the period of reduced operating hours (Hodgson, SPS Ex. 2, para. 2). Mr. Hodgson's testimony was corroborated by the oral testimony of the School System's General Counsel, Michael Hoge (Hoge, Tr. 1022, 1024), and the testimony of Jack Straw's rebuttal witness – Richard Alexander – a former School Board member (Alexander, JS Ex. 32, paras. 3-4; *see* Alexander, Tr. 2569- 2577). The circumstances leading to the restoration of the 84-hour per-week operating schedule were described by T. J. Vassar, who was a member of the School Board and Chairman of the Board's Curriculum, Instruction, and Evaluation (CI&E) Committee during this period (Vassar, SPS Ex. 3).

140. Mr. Hodgson testified that beginning in 1981, the School System experienced budget difficulties because the Washington State Legislature had failed to provide adequate funding for the regular, vocational, and certain special (*i. e.*, handicapped) educational programs (Hodgson, SPS Ex. 2, para. 4). The School System began litigation against the State challenging the constitutionality of the funding cuts – not an easy step to take (Vassar, Tr. 1046-1047, 1049). Pending resolution of the mater in the School System's favor (*see* para. 154, *infra)* the funding shortfalls required across-the-board cuts that affected all of the School System's programs, including the radio communications program (Hodgson, SPS Ex. 2, para. 4).

141. Thus, it appeared by spring 1981 that the School System would not have the funding needed to continue operating the station at least 84 hours a week (Hodgson, Ex. 2, para. 5). Those individuals with responsibility for the program began searching for alternatives. In order to operate the station a minimum of 84 hours per week while alternatives were being explored, the Assistant Superintendent sought and obtained supplemental funding from the Superintendent's contingency fund. (*Id.*) Additional funds were not available from the station itself because it did not, at this time, engage in any fundraising or accept underwriting credits. (*Id.*)

142. One of the alternatives that surfaced during this period was a recommendation by the former Assistant Superintendent to cease operation of the radio station entirely (Hodgson, SPS Ex. 2, para. 5). However, according to Mr. Hodgson, this alternative was rejected by the Superintendent without ever reaching the School Board, and attention was focused on other less drastic alternatives that would allow the radio station to remain a part of the vocational education curriculum. (*Id.*)

143. One of the alternatives that had substantial support was for the station to enter into some type of sharing arrangement with another educational institution or organization (Hodgson, SPS Ex. 2, para. 6). The School System initiated discussions looking toward such an arrangement with the Bellevue School District and Seattle Central Community College (SCCC). The School System was also approached in June 1981 by Ernest Nash, who was then on the Board of Jack Straw (Hodgson, Tr. 963). Mr. Nash explained that Jack Straw was planning to sell KRAB's commercial frequency and to re-locate on the noncommercial band, and that Jack Straw was interested in the KNHC frequency (Hodgson, SPS Ex. 2, para. 6). Throughout these discussions, the School System had a clear preference for entering into some kind of cooperative relationship with SCCC, principally because the administrators believed that SCCC, as an educational institution, had more interest in the School System's students and that it would cooperate in developing a curriculum to provide a continuum from the high school to the community college level (Hodgson, SPS Ex. 2, para. 7).

144. Eventually, the School System entered into an agreement with SCCC under which SCCC provided some taped programming to be broadcast on KNHC (Hodgson, SPS Ex. 2, para. 7; JS Ex. 21; Hodgson, Tr. 968-970). A second, later agreement provided that SCCC would be responsible for 28 hours of broadcast time per week -- 12 hours each on Saturdays and Sundays and four hours on Friday evenings (JS Ex. 22; Neilson, SPS Ex. 1, para. 7; LaFayette, SPS Ex. 29, para. 3). To effectuate the second agreement, a remote studio of KNHC was installed at SCCC, and, in September 1981, SCCC hired a part-time employee, Gregg Neilson, to supervise the SCCC students who were on the air on KNHC on Friday evenings and on Saturdays and Sundays (Neilson, SPS Ex. 1, paras. 5, 7; Hodgson, SPS Ex. 2, para. 7). Because Mr. Neilson was also employed by the School System at that time as an instructional assistant, his presence in both programs provided continuity in the curriculum and the station's operation (Hodgson, SPS EX. 2, para. 7).

145. By the summer of 1982, however, the funding problems of 1981- 1982 had worsened as the Legislature made further cuts for the September 1982- August 1983 fiscal year (Hodgson, SPS Ex. 2, para. 8). Consequently, the administrators were again facing an inadequate budget for the radio station, coupled this time with the likelihood that SCCC would have to drop out of the cooperative arrangement because of its own funding problems. (*Id.*) In July 1982, the Assistant Superintendent recommended that the Superintendent allocate additional funds from his contingency fund to continue on-air broadcasting at KNHC while a comprehensive study of the radio station was undertaken by a committee. (*Id.*) The committee's charge was to "include the question of financial support either through direct District allocation or some fund- raising approach," and the committee was cautioned to undertake a "very careful analysis of the future of KNHC before any action [was] taken, either overtly or by default, which could result in a loss of the license." (*Id.* ; *see also* SPS Ex. 67)

146. It is clear that, throughout this period, the station maintained its operating schedule of at least 84 hours per week (Hodgson, SPS Ex. 2, para. 8; Hodgson, Tr. 949-956; *see also* Neilson, SPS Ex. 1, Attachment D, at 1-27). Then, on August 30, 1982, Mr. Hodgson met with others in the administration with responsibility for the radio station to discuss the operating schedule for the 1982-1983 school year (Hodgson, SPS Ex. 2, para. 9). These administrators recommended to the Assistant Superintendent that the School System reduce the station's hours of operation to a total of 56-58 hours per week, consisting of 30 hours from the studio at Nathan Hale and 26-28 hours from the remote studio at SCCC. They also recommended that the agreement with SCCC be extended and that the committee meet at an early date to prepare proposals regarding the budget, the programming, and the on-air schedule for the 1983-1984 school year. (*Id.*)

147. The recommendation to reduce the station's operating hours was based in part on information received by Mr. Hodgson and others from various sources, including several telephone conversations with persons at the Commission, that led them to believe that the Commission might be flexible with respect to the minimum operating hours and that if the station were to fall below 84 hours per week because of budget or other serious problems, the School System would have the time and the opportunity to remedy the situation before the license renewal application was filed (Hodgson, SPS Ex. 2, para. 10; Hodgson, Tr. 996-998, 1006-1008; Vassar, Tr. 1207-1208). Mr. Hodgson testified that no one involved wanted to cut back the station's hours and they would not have recommended such action except for the funding problem (Hodgson, SPS Ex. 2, para. 10). The administrators recognized that there was some jeopardy in the reduction, but they needed the time to review the situation fully. (*Id.*) In a memorandum dated September 1, 1982, the Assistant Superintendent stated that the Superintendent had authorized the reduction in hours pending the completion of a comprehensive study, which was to be undertaken promptly. (*Id.*, para. 11)

148. Mr. Vassar testified that he learned about the reduction in hours shortly after it had been authorized and that he understood the action to be a temporary measure while the Superintendent's office prepared a comprehensive proposal for the future operation of KNHC (Vassar, SPS Ex. 3, para. 6). While Mr. Vassar was concerned about the reduction in operating hours, because he was convinced that KNHC was a "valuable educational tool to be preserved as a District resource," he felt confident that a comprehensive study of the radio station would lead to a positive resolution of the issues (Vassar, SPS Ex. 3, paras. 6, 11).

149. A draft of the Superintendent's report was circulated in November 1982 and considered by the Board at its regular meeting on December 2, 1982 (Vassar, SPS Ex. 3, para. 6; *see also id.*, Attachment A (Proposal for Future Operation of Radio Station KNHC-FM)). The report began with the assumption that the radio station should be maintained as a School System resource and, to that end, recommended a three-year financial commitment to the program, a plan for fundraising and underwriting, and a shared-time arrangement with SCCC or another educational institution (Vassar, SPS Ex. 3, Attachment A). The Board referred the report to its Curriculum, Instruction, and Evaluation (CI&E) committee for review and recommendations (Vassar, SPS Ex. 3, para. 6; Vassar, Tr. 1066-1067).

150. The report was discussed at an open meeting of the CI&E Committee held on January 5, 1983 (Vassar, SPS Ex. 3, para. 7; JS Ex. 41). Mr. Hodgson attended the meeting to present background information on the station and to answer questions about its operation (Vassar, SPS Ex. 3, para. 7; *see also* Hodgson, SPS Ex. 2, para. 12). Mr. Hodgson informed the Committee that "the station was not operating 84 hour a week and that this could mean that another agency could ask the FCC to let them use some of the station's unused air time" (Vassar, SPS Ex. 3, para. 7). However, Mr. Hodgson also indicated that the Commission's rules were flexible and that the School System might be able to explain its circumstances to the Commission and avoid forced time-sharing. (*Id.*)

151. The two subjects that received the most attention at the CI&E meeting were (1) the basis for the unwritten policy against fundraising activities; and (2) the proposal for a three-year financial commitment for the radio station (Vassar, SPS Ex. 3, paras. 7-8, Attachment A). Both subjects related to the question of how best to put the radio station on a sound financial footing. The sense of the meeting was that the restrictions on fundraising were not justified by policy reasons and had an inhibitory effect on the radio program; by lifting these restrictions, the future of the radio program would be appreciably less risky (Vassar, Tr. 1065-1066, 1153, 1170- 1172). There was more

controversy with respect to the proposal for a three- year financial commitment. While it would avoid the scramble for supplemental funds that had occurred in 1981 and 1982, it was viewed by one member of the Committee as giving unfair preferential treatment to the radio station compared to all other school programs, which were required to undergo an annual budget review process (Vassar, SPS Ex. 3, para. 8). After a thorough discussion of the possible solutions, the Committee voted to recommend to the full Board that KNHC be preserved as a valuable District resource and that the station be permitted to engage in fundraising and be given a three-year financial commitment. (*Id.*)

152. The Committee's recommendations for the radio station were discussed at a February 2, 1983, open meeting of the Board (Vassar, SPS Ex. 3, para. 9). Although the Board members did not take a formal vote, they reached a consensus that the station should be permitted to engage in the types of fundraising activities authorized by the Commission and that special accounting procedures should be established, if necessary, to allow those funds to be earmarked for the radio station. (*Id.*) According to Mr. Vassar, the clear purpose of the decision was to enable the station to operate 84 hours a week. (*Id.*) There was also a consensus that a three-year financial commitment was not necessary in view of the lifting of the fundraising restrictions. (*Id.*).

153. The station's hours of operation began to increase shortly after this meeting. By mid-March 1983, the station was operating consistently more than 84 hours per week total, and by April 8, 1983, it was operating consistently more than 12 hours each day (Neilson, SPS Ex. 1, para. 25, Attachment D at 37, 38). At about this time, the School System received a favorable decision in its constitutional challenge to the State funding cuts, with the result that State appropriations for 1983-1984 were substantially improved and likely to remain more stable in the future (Vassar, SPS Ex. 3, para. 11). In any event, Mr. Vassar testified that the School Board was committed to full funding of the station (Vassar, Tr. 1172-1173, 1212-1213)

154. Some time in June 1983 -- after the station had resumed a full schedule of 84 hours a week -- Jack Straw submitted a written proposal to the School System to share time on KNHC's frequency (Vassar, SPS Ex. 3, para. 12). Jack Straw's proposal was submitted after there had been several informal contacts with various representatives of the School System (Margason, Tr. 1573, 1592). The written proposal would have limited the School System's use of the frequency to school hours and school days (Vassar, SPS Ex. 3, para. 12). Mr. Vassar could not recall precisely when the written proposal was received (Vassar, Tr. 1214). Mr. Vassar was certain, however, that it never became an agenda item at any Board or committee meeting and played no role whatsoever in the Board's determination to see the station's hours restored to at least 84 per week (Vassar, Tr. 1214-1215, 1221, 1223-1224; Vassar, SPS Ex. 3, para. 12). Rather, that determination was the result of the Board's review of the radio communications program and a decision following that review to support, defend, and protect that program by whatever means were required (Vassar, Tr. 1077- 1078, 1215).

COMPARATIVE ISSUE - ISSUE 4

155. The evidence submitted by the School System and Jack Straw under issue 4, the standard noncommercial comparative issue, is discussed below.

School System

1. ***Present and Proposed Integration of Station KNHC into the School System's Educational and Cultural Objectives***

156. Most of the elements of the radio communications program described under renewal expectancy relating to the integration of the radio station into the educational objectives of the School System have continued through the post-renewal period (Neilson, SPS Ex. 1, para. 18-24, 26-62; Neilson, Tr. 661-662, 664-669). Among other things, the School System has carried forward in the post-renewal period the basic radio communications curriculum, including the two-level course offering described above (para 22). The following chart sets forth the enrollment in the introductory and advanced classes during the post-renewal period.

Semester	Intro. Students	Advanced Students	Total	New Adv. Students
Nathan Hale High School				
Fall 1984	55	38	93	23
Spring 1985	68	55	123	30
Falls 1985	55	56	111	30
Spring 1986	68	64	132	24
Fall 1986	49	60	109	30

Source: SPS Ex. 65-a.

Semester	Intro. Students	Advanced Students	Total
Cleveland High School			
Fall 1984	45	26	71
Spring 1985	35	41	76
Fall 1985	21	10	31
Spring 1986	40	26	66
Fall 1986	53	25	78

Source: SPS Ex. 70.

157. The operation of KNHC continues to be integrated into the curriculum, as the students learn their skills through hands on experience operating a "real" radio station.[9] The basic premises of the program -- that the students will bear substantial responsibility for the operation of the radio station under the direction of the General Manager and the course instructor(s), and that such responsibility will enable the students to develop technical skills as well as interpersonal skills -- remain the same (Neilson, SPS Ex. 1, paras. 18, 22; Vassar, SPS Ex. 3, para. 15). So too, the operation of the station continues to be used to achieve other School System goals (Vassar, SPS Ex. 3, para. 14).

158. The continuity in the program results from the belief that the program is fundamentally successful in achieving its educational objectives (Neilson, SPS Ex. 1,

para. 71). There have been some modest changes, however, principally in the nature of (a) refinements of the organization and operation of the station adopted by Mr. Neilson after he became General Manager; (b) strengthening of the relationship between the radio programs at Nathan Hale and Cleveland High Schools; and (c) continued improvements in KNHC's technical facilities.

159. The organizational changes include the creation of the position of Operations Manager and the correlative split of the station's student staff into two divisions – Programming and Operations. The position of Operations Manager parallels the position of Program Director in the station hierarchy, and the students occupying these two positions report directly to the student Station Manager (Neilson, SPS Ex. 1, paras. 26, 27; Neilson, Tr. 661-662). The departments that fall within the jurisdiction of the Operations Manager are Continuity, Network, Production, Traffic, Public Relations, Engineering, and Safety (Neilson, SPS Ex. 1, para. 26). The Program Director remains responsible for the News, Sports, Music, and Public Affairs Departments and for the on-air announcers. (*Id.*)

160. Another change in the station's operation initiated by Mr. Neilson is the implementation of a "Level of Announcership" system of discipline and reward, which is intended to motivate the student announcers to achieve superior performance in carrying out their responsibilities (Neilson, SPS Ex. 1, para. 41; Neilson, Tr. 662). Each level in the four-level system carries with it certain requirements and duties that must be fulfilled and maintained by the students in order to remain at their current level or to advance to a higher level. If a student announcer does not maintain the standards required by each level, he or she is lowered to the previous level (Neilson, SPS Ex. 1, para. 41).[10]

161. Mr. Neilson has also recently imposed a requirement that *all* advanced students, rather than just those formally assigned to the Public Affairs Department, must produce public affairs programs for broadcast on KNHC – at least one each month of the school terms. (*See* Neilson, SPS Ex. 1, para. 34; Lingerfelt, SPS Ex. 33, paras. 3-4) In addition, the Student Learning Objectives were updated (*compare* Neilson, SPS Ex. 1, Attachment G *with* Neilson, SPS Ex. 64; Neilson, Tr. 665-668).

162. An important change of refinement that has occurred during the post-renewal period is a strengthening of the ties between the radio program at Nathan Hale and the mirror program at Cleveland. Since school year 1985-1986, two Cleveland students have appeared regularly on-air on KNHC (Wang, SPS Ex. 4, para. 10). In 1984-1985, when KNHC first aired its "Metro Game of the Week" program, Cleveland students were given responsibility for production of the pre-game show, which included student interviews with the coaches and players. (*Id.*) In the spring of 1986, Mr. Wang, the instructor at Cleveland, taught a five-session workshop for the Nathan Hale students on the production of commercials and PSAs, with three of the sessions at Hale and two at Cleveland. (*Id.*) Mr. Wang now regularly attends the monthly staff meetings at KNHC; Mr. Neilson visits Cleveland once a month to bring the Cleveland students up to date about what is happening at the radio station; and other informal means exists for the sharing of ideas and information. (*Id.*, para. 11)

163. Mr. Wang testified that he anticipates increased involvement of Cleveland students in the operation of KNHC (Wang, SPS Ex. 4, para. 12). As the Cleveland program grows and produces more broadcast-quality announcers, more students will be eligible for air shifts on KNHC. (*Id.*) Since Cleveland and Nathan Hale are located at opposite ends of Seattle, travel time precludes the Cleveland students from scheduling air shifts during the regular school day. (*Id.*) However, the availability of air time after school and on weekends makes it possible for these students to handle regular air shifts. (*Id.*) Consideration is also being given to converting one of Cleveland's three broadcast studios to a remote studio of KNHC, which would also increase the on- air opportunities for the Cleveland students. (*Id.*)

164. This leads to other technical plans or changes that have occurred since the end of the license renewal period. Among other things, the station has in the last two years either purchased or obtained through donations equipment comprising approximately one-quarter of the total inventory of Studio A and one-half of the total inventory of Studio B (Neilson, Tr. 658- 661). With the exception of a compact disc player, all of the new equipment obtained for Studio A replaced existing equipment. (*Id.* at 658-659). With respect to Studio B – the main production studio – 18 of 24 pieces of equipment represented new additions to the existing inventory; the remaining six items were replacements of old equipment. (*Id.* at 659) Notable among the new additions are a Moog synthesizer for special effects and a digital delay machine for the station's live call-in public affairs programs. (*Id.* ; *see also* Neilson, SPS Ex. 2, para. 16)

165. The station has also purchased and installed a four-meter satellite receiving antenna and mount, stereo receiver, low noise amplifier, and block down converter to enable it to receive and broadcast the Sheridan News Network hourly satellite transmissions (Neilson, SPS Ex. 1, paras. 16, 30; Neilson, Tr. 660; *seealso* para. 190, *infra).*

166. Finally, the station has sought and obtained another power increase. Specifically in July 1984 KNHC applied to increase its power from 3000 watts to 10,000 watts (Neilson, SPS Ex. 1, para. 17). The application was granted in January 1987. (*See* SPS Ex. 83) In July 1986, the station installed a new Broadcast Electronics solid state transmitter for eventual broadcasting at 10,000 watts, which can be further upgraded and duplexed to broadcast at an effective radiated power of 30,000 watts – the School System's ultimate goal for the future (Neilson, SPS Ex. 1, para. 17).

2. Meeting *Community Needs During the Post - Renewal Period*

a. *Station KNHC Remains a Unique Educational Experience*

167. The substantial testimony set forth above under renewal expectancy as to the unique educational opportunity offered by Station KNHC is equally applicable to the post-renewal period and, indeed, to the School System's proposal for the future. To support this claim, the School System introduced testimony of several of the current students, who spoke of their experiences with a radio program that enables them to broadcast live, over-the- air to the greater Seattle community. *See , e. g.*, Danielson, SPS Ex. 13, para. 6 (The process of running a real radio station involves lessons in social awareness, commitment, cooperation, and responsibility. I feel that my involvement with the radio program has helped me to learn some of these difficult lessons.); HU, SPS Ex. 24, para. 6 (It is only

through experience on the air that you can learn how to be an announcer, and you learn best my being thrown into it and learning by your mistakes.); McDaniel, SPS Ex. 39, para. 4 (The radio program . . . is important because it gives high school students on- the-air experience in radio announcing.).

168. Virtually all of the currently enrolled students who offered testimony -- like those from the renewal period -- praised the program generally and KNHC in particular, not only for giving them technical skills but also for contributing to their development as individuals. *Se, e. g.*, Chodkiewicz, SPS Ex. 12, para. 4 (The program has helped to develop my interpersonal skills as well. I have gained much more confidence in myself.); Danielson, SPS Ex. 13, para. 6 (The program teaches us that one cannot make it through life alone. What we do is a team effort, and everyone must do his or her part. For this reason, everyone at the station has learned to help everyone else.); HU, SPS Ex. 24, para. 4 ([T]he people in the radio program included me in their group. It made me feel special because there are so many different types of people in the program. They don't shut you out because you are different; rather, they invite different attitudes because those differences are what make KNHC special.); Jawa, SPS Ex. 25, para. 6 (My experience [at KNHC] continues to build my confidence while teaching me responsibility, professionalism, and broadcast skills.); McCoy, SPS Ex. 38, para. ([E]ach student must do his or her job or the whole program may fall apart.); McDaniel, SPS Ex. 39, paras. 3, 6 (My participation in the radio program has given me an increased sense of responsibility. I have gotten much better at dealing with people. . . . People are quick to help other students, and the training system creates a sense of team spirit. This team spirit unites a large group of diverse people around a common goal.); Suarez, SPS Ex. 53, paras. 3, 6 (This program made me a completely different person. It changed my attitudes and goals and made me more secure and self-confident. . . . This program has taught me things I thought were beyond my grasp; responsibility, maturity, and interpersonal skills, as well as the logistics of broadcasting.).

169. The student's views are shared by some of their parents. *See , e. g.*, Hawkins, SPS Ex. 22, para. 5 (Since [my handicapped son] became involved with KNHC, I have seen him mature and develop a self-confidence that he did not process before.); Lingerfelt, SPS Ex. 43, para. 2 (The radio program and KNHC have been a tremendous boon to [my son's] personal development and his high school career. He has acquired a broader perspective and demonstrates a conscious responsibility towards society in general and teen problems specifically . . . . [My son] has become more energetic and focused about his academic studies and his future career plans.).

170. While the sample is small, the current crop of students includes several whose accomplishment and career objectives reflect the success of the program. *See , e. g.*, Chodkiewicz, SPS Ex. 23, para. 4 (Because of the announcing skills I acquired [on KNHC], I was able to work as an announcer at Station KUBE(FM) . . . this summer working weekends, at night, and to fill in as needed during vacation periods. . . . The program directors at two metropolitan commercial radio stations told me that I will not have any trouble getting a job when I graduate.); Hu, SPS Ex. 24, para. 7 (Because of everything I've learned at this station, I've decided I'd like to make a career in broadcasting. . . . I'd like to specialize in communications electronics.); Jawa, SPS Ex. 25, para. 2 (Because of my exciting experiences at KNHC, I am now planning to attend Fordham University to earn a degree in communications.); Lingerfelt, SPS Ex. 33, paras. 1, 8 (Following graduation, I hope to acquire my own radio station, probably on the AM band. . . . [KNHC is] a terrific confidence-builder and learning experience for broadcasting and for life.); McCoy, SPS Ex. 38, para. 5 (The KNHC program has taught me a lot. When I came to Nathan Hale, I thought radio was a game. I soon found out that it is hard work and a real business.); McDaniel, SPS Ex. 39, para. 5 (After graduation, I would like to pursue a career in broadcasting. If I cannot get a job in the field right after I graduate, I will go to college for a degree in communications. However, I am confident that I will get a job at a commercial station because the experience I have gained at KNHC has prepared me for such a job.); Suarez, SPS Ex. 53, para. 2 (The job [of Public Affairs Director] gave me a sense of purpose and a great feeling of responsibility. I really care about my accomplishments in radio because I see radio as part of my future.); *see also* Kyle, SPS Ex. 28, para. 9.

b. *Station KNHC Programming Continues To Serve the Needs of the Seattle Community*

171. The basic programming philosophy of KNHC described under renewal expectancy has essentially remained the same in the post-renewal period. The station has maintained and refined its dance music format, which appeals to young people, and has continued to gear a portion of its public affairs programming to the special needs and interests of teens and young adults (Vassar, SPS Ex. 3, para. 23). The station also continues to broadcast locally produced and institutional issue-responsive programming based in part on ascertainment of the needs and interests of the greater Seattle community; indeed, as noted above (para. 161), it is now an obligation of all advanced students to produce at least one public affairs program each month of the school term. The station also continues to broadcast approximately hourly during the school day local news reports that are wholly student-produced; in addition, as described more fully below (para. 190), the station began subscribing to a radio news network to supplement the local news. Finally, the station has continued to broadcast a large number of PSAs and other nonentertainment programs.

172. The General Manager has continued during the post-renewal period to participate in the monthly group ascertainment meetings organized by Seattle's commercial television stations. (*See* supra ; Neilson, Tr. 892-895) The student Public Affairs Director remains responsible for preparing the quarterly lists of community issues based on the ascertainment interviews (Lingerfeld, SPS Ex. 33, para. 6). The School Systems submitted its quarterly Issues/Programs lists for the post-renewal period (Neilson, SPS Ex. 57, Attachment G, at 139-184). These lists reflect that the station identified a minimum of 16 issues of public importance each quarter. (*Id.*) The lists also provide typical and illustrative programs aired by KNHC during the post- renewal period in response to these issues. (*Id.*) A more comprehensive description of KNHC's issue-responsive programming is set forth below.

i. *KNHC - Produced Public Affairs Programs*

173. Several of the programs described in the category of KNHC- produced public affairs programs under renewal expectancy continued past the license renewal period. Other such public affairs programs were carried for the first time in the post-renewal period. Public affairs programs produced by KNHC that were aired in the sample weeks during some or all of the post-renewal period through August of 1986 include:

174. *Action Line* – This live public affairs program, which is described above (para. 70), continued beyond the license renewal period until May 1985 (Neilson, SPS Ex. 57, at 68, 86). In the latter months, two students were selected to be the hosts and they eventually assumed full responsibility for producing the program. Topics included abortion, gun control, prayer in the schools, capital punishment, and nuclear arms (Alford, SPS Ex. 5, paras. 6- 7; *see also* Neilson, SPS Ex. 1, para. 36; Higbee, SPS Ex. 23, para. 4 (Being the host of a debate show such as 'Action Line' helped me to mature. The role was like that of an arbitrator, and I was required to intervene if the debate got off track or got too hostile. I also became very experienced at fielding telephone calls. The studio had only one phone line, which created problems. We couldn't keep a caller on the line too long because other people might be trying to get through. On the other hand, we also had to worry about 'dead air' if no one called in.); Shostak, SPS Ex. 50, para. 4 ([T]he engineer at the stations had been acting as host, but he resigned from the task to allow the students to take over. This meant that both the producing and the hosting were to be done by [another student] and myself. We chose another student. . . to help us with these tasks, and eventually the three of us were totally running the weekly show. For a while, both [the other student] and I were co-hosting, as well as co-producing, the show. I think that this was the highlight of my time with 'Action Line' because the show was more fun and more interesting when we used two hosts. Apparently, the audience agreed with us because the number of call-ins increased tremendously during this time.).

175. *Back Page* – Produced by KNHC, this 1-hour weekly public affairs program was created to address ascertained issues of concern to the Seattle community and was first aired in May 1986 (Neilson, SPS Ex. 57, at 102). Topics covered included disabilities and child abuse. (*Id.* ; Neilson, SPS Ex. 1, para. 38) "Back Page" was hosted by a volunteer who had had previous public affairs experience on public radio (Neilson, SPS Ex. 57, at 102). During each show, one or two guests were interviewed on a given topic. Student involvement was limited to technical functions. The program was broadcast live on Sundays at 2:30 p.m. (*Id.*)

176. *Call Katie* – Produced by KNHC, this program first aired in May 1986 as a weekly 30-minute taped interview program (Neilson, SPS Ex. 57, at 103-104). It was hosted by Kathy Hauck, an adult volunteer. Topics for "Call Katie" were selected to meet the ascertained needs of the Seattle community, with a special emphasis on issues of concern to teens. The program soon evolved into a 1-hour live program, with a consistent format – the host conducted a brief initial interview of the guest, followed by questions from a student panel. The phone lines were then opened and the listeners were invited to "Call Katie" to discuss the topic for the day. (*Id.* ; Neilson, SPS Ex. 1, para. 37) In 1986, the "Call Katie" program was awarded a 2000 grant from PIPE for the purchase of new digital delay equipment for the call-in feature of the program. (*See* para. 201, *infra).*

177. Student participation in the production of "Call Katie" has been an important aspect of the show. Reshma Jawa, a student currently enrolled in the radio program who was assigned to assist in the production of "Call Katie" during school year 1986-1987, testified that she was responsible for lining up appropriate guests, developing questions, and supervising the production of the program (Jawa, SPS Ex. 25, para. 1, 4). Each week several other students were assigned to assist in the preparation and broadcast of the program, including researching the topic and developing questions to ask the guest (Neilson, SPS Ex. 1, para. 37). In addition, a panel of three students participated in the live broadcast by asking questions of the guest on the air. (*Id.*) Other student responsibilities in the production of "Call Katie" included screening the telephone calls and handling the technical aspects of the broadcast (Neilson, SPS Ex. 57, at 104; Neilson, SPS Ex. 1, para. 37).

178. *KNHC Magazine / Sunday Report* – This public affairs program consisted of several recorded programs packaged by the students, with lead-ins prepared by them, in a news magazine format (Neilson, SPS Ex. 57, at 109-111). The individual segments were chosen on the basis of their timeliness, duration, and other factors. (*Id.*) Topics covered included space exploration, science discoveries, the government, the environment, the economy, employment, drug and alcohol abuse, nutrition, crime, and medical advances. (*Id.*) The series was broadcast throughout school year 1985-1986 on Sunday afternoons at 2:00 p.m. for 30 or 60 minutes. (*Id.* at 109)

179. *Mid - East Internati* o *nal* – The program, which is described above (para. 3), continued beyond the license period until February 1986 (Neilson, SPS Ex. 57, at 76-77, 92, 111).

180. *Sponsor* : *KNHC* – Originally produced under the title "KNHC Public Affairs" (*see* para. 76, *supra),* this series was restructured during school year 1985-1986 to encourage participation from all advanced students in the radio program (Neilson, SPS Ex. 1, para. 34; Lingerfelt, SPS Ex. 33, para. 3-4; Neilson, Tr. 790-792). Topics covered included such issues as child abuse, drug and alcohol issue, crime, teen suicide, the elderly, homelessness, teen pregnancy, nuclear arms, AIDS, the economy, violence on TV, the changing family, environmental concerns, abortion, and cancer (Neilson, SPS Ex. 57, at 113-114). The series was broadcast on weekday mornings; the program segments were 1 to 5 minutes in length. (*Id.*)

ii. *Institutional Public Affairs Program*

181. Here, as above, several of the programs described in the context of the renewal expectancy (*see* paras. 80-106, *supra)* continued to be broadcast in the post-renewal period, and other, new public affairs programs were added. Institutional public affairs programs that were carried in the sample week during some or all of the post-renewal period through August 1986 include:

182. *Man and Molecules* – This program, which is described above (para. 84), continued beyond the license period until July 1985 (Neilson, SPS Ex. 57, at 76).

183. *Aware* – The program, which is described above (para. 90), was continued on and off throughout the post-renewal term (Neilson, SPS Ex. 57, at 69-70, 86, 100.

184. *Blacks Before America* – This program, which is described above (para. 91), continued throughout the post-renewal term (Neilson, SPS Ex. 57, at 71, 88).

185. *Cornell University* – This program, which is described above (para. 93), was broadcast on and off throughout the post-renewal term (Neilson, SPS Ex. 57, at 72, 89, 104).

186. *Labor News and Views* – This program, which is described above (para. 101), continued beyond the license period until June 1984 (Neilson, SPS Ex. 57, at 74-75).

187. *Sensing the News* – Sponsored by the U.S. Business and Industrial Council, this program examined current economic and political issues (Neilson, SPS Ex. 57, at 94). The program was broadcast during school year 1984-1985 on weekdays around noon and lasted for 3 to 5 minutes. (*Id.*)

188. *Washington Focus – Senator Evans* – Sponsored by U.S. Senator Evans' office in Washington, D.C, this recorded program focused on a variety of issues of importance to the people of the State of Washington and afforded Senator Evans the opportunity to keep his constituency informed about current National legislative issues (Neilson, SPS Ex. 57, at 94). The series was carried during most of the school year 1984-1985 on weekday afternoons; the program segments lasted for 1 to 6 minutes. (*Id.* at 95)

189. *Washington Report – Senator Gorton* – This program which is described above (para. 105), continued beyond the license renewal period until August 1985 (Neilson, SPS Ex. 57, at 80, 95).

iii. *Other Nonentertainment Programming*

190. *News* – KNHC continued its practice of broadcasting student- produced news reports of 4 to 5 minutes duration during the school day. Mr. Neilson testified that since he became General Manager, he has increased the frequency of news broadcasts to approximately hourly (Neilson, SPS Ex. 1, para. 30; *see also* Neilson, Tr. 780-781). In addition, since the spring of 1984, KNHC has subscribed to the Sheridan News Network, the only minority-owned network news service in the country (Neilson, SPS Ex. 1, para. 30). KNHC receives the Sheridan transmissions once an hour via satellite. The incoming feed contains commercials, which Sheridan permits KNHC to delete. The on-air announcers listen to the network news as it is airing, reduce the volume as the feed shifts to a commercial, insert a PSA cart of the same length as the commercial, and raise the volume when the commercial/PSA has ended (Neilson, Tr. 781-782; Neilson, SPS Ex. 1, para. 30). Beginning in school year 1986- 1987, the station also plans to subscribe to the AP wire service (Neilson, SPS Ex. 1, para. 30).

191. *Public Service Announcements* – Announcements similar to those described above (para. 108), were aired throughout the post-renewal period. Additional illustrative agencies include: American Red Cross, Department of Health and Human Services, Girl Scouts of America, Seattle Department of Public Health, Seattle Public Library, Seattle Tenants Union, Seattle Poison Center, United Negro College Fund, University of Washington, and Veteran's Administration (Neilson, SPS Exs. 61-63 *passim).*

192. From February 1984 to August 1984, KNHC broadcast PSAs for approximately 85 organizations (Neilson, SPS Ex. 61 *passim).* During the 1984- 1985 school year, KNHC broadcast PSAs for approximately 120 organizations, including approximately 90 that had not been carried on KNHC in the previous year (Neilson, SPS Ex. 62 *passim).* During the 1985-1986 school year, KNHC broadcast PSAs for approximately 110 organizations, including approximately 70 that had not been carried on KNHC in the previous year (Neilson, SPS Ex. 63 *passim).*

193. *Other Nonentertainment Programming* – As in the past, the station has continued to broadcast informational programs covering a wide range of topics. Programs in this category which were broadcast in the post-renewal period through August 1986 include:

194. *Black Heroes* – Produced by the Intercollegiate Broadcast System and sponsored by KNHC beginning in the summer of 1984, this recorded program featured biographical information on Black heroes, their place in history, and their importance as role models for youth (Neilson, SPS Ex. 57, at 70). The program was broadcast on weekday afternoons, lasted for 1 1/2 minutes, and was carried through the first half of school year 1985-1986. (*Id.* at 70-71, 87-88, 103)

195. *Info Radio* – Sponsored by Warner Brothers Communications, this recorded informational program addressed a wide variety of issues including drug use, exercise, the use of computers, rock and roll, teen suicide, automobiles, and income taxes (Neilson, SPS Ex. 57, at 90-92). The series was carried from the fall of 1984 through the the 1985-1986 school year on weekdays; the program segments ranged in length from 30 seconds to 1 1/2 minutes. (*Id.* at 90-92, 105-108)

196. *Lasser's Tax Institution* – Sponsored by the J. K. Lasser Tax Institution of Englewood, New Jersey, this recorded program sought to present complicated investment, business, money management, and tax information in easy to understand language for the general public (Neilson, SPS Ex. 57, at 114). The series was carried in the spring of 1986 on weekdays; the programs segments ranged in length from 1 to 1 1/2 minutes. (*Id.* at 114-115)

197. *Mother Earth News* – The program, which is described above (para. 119), was continued on and off through the post-renewal period (Neilson, SPS Ex. 57, at 77, 111).

198. *Perspectives in Science* – Sponsored by the Carnegie Institute, this recorded program featured the works of famous scientists and their discoveries (Neilson, SPS Ex. 57, at 93). The program was broadcast from September to December 1984 on weekdays during the 9:00 a.m. or 10:00 p.m. hours, and ranged in length from 1 to 5 minutes. (*Id.*)

199. *The Word* – This program, which is described above (para. 124), continued throughout the post-renewal period (Neilson, SPS Ex. 57, at 80-81, 96, 115-116).

200. *World of Technology* – Sponsored by the DWJ Association, this recorded program explained the technology of aviation in lay terms (Neilson, SPS Ex. 57 at 119). The series was carried in the fall of 1985 on weekday afternoons; the program segments lasted 1 1/2 minutes. (*Id.*)

c. Other Factors Indicating Station KNHC Is Providing and Will Continue to Provide *a Superior Noncommercial Service*

201. *PIPE Program* : As noted above (para. 136), KNHC had ongoing relationships with the three network-affiliated stations in Seattle during the license period. These relationships were officially made part of the PIPE program after the end of the renewal period (Neilson, Tr. 662-664).

The radio program's PIPE partner for school year 1984-1985 was KOMO, Seattle's ABC affiliate; for school year 1985-1986, the partner was KIRO, the CBS affiliate (Neilson, Tr. 662-664; Neilson, SPS Ex. 1, para. 67). The PIPE partners have assisted in the planning of field trips for the students to the PIPE partner's stations and to businesses in allied fields, such as advertising agencies, cable television systems, video production companies, educational TV stations, and the local telephone company (Neilson, SPS Ex. 1, para. 67). The PIPE program also awards grants for deserving projects in the School System. One of the radio station's newest programs -- "Call Katie" -- was awarded 2000 in 1986, which is the maximum amount available under the PIPE grant program. (*Id.*)

202. *Evening Volunteers* : During the post-renewal period, the station has continued its practice of using adult volunteers for the late evening air shifts (Neilson, SPS Ex. 1, para. 64).[11] The volunteers, most of whom have prior broadcast experience, are intended to serve as role models for the student announcers. (*Id.* ; Neilson, Tr. 901) The students, however, also benefit from the opportunity to critique the adult volunteer when he or she "flubs up" (Neilson, SPS Ex. 1, para. 64; Neilson, Tr. 901). The students also remain responsible for the selection and scheduling of the programs, and for preparing the logs, for these shifts (Neilson, SPS Ex. 1, para. 64; Neilson, Tr. 901).

203. *Radio Communications Advisory Committee* : As noted above (para. 137), shortly after Mr. Neilson became General Manager in October 1983, the duties of the Radio Communications Advisory Committee were expanded beyond the classroom/textbook aspect of the program to include all aspects of the operation of the radio station (Neilson, SPS Ex. 1, para. 68). The Radio Communications Advisory Committee currently draws on professionals from a variety of disciplines, including education, engineering, journalism, broadcasting, marketing, and finance (Hawkins, SPS Ex. 21, para. 3). The subjects regularly discussed at the Committee's meetings include the station's music format, public affairs programming, Commission regulations, listener surveys, and fundraising events. (*Id.*) Most recently, the Committee has focused on making KNHC's fundraising a success and enhancing the awareness and credibility of KNHC in the Seattle market. (*Id.*)

204. *Hours of Operation* : The School System submitted evidence demonstrating that it has consistently broadcast above the 84-hour level specified in Section 73.561 of the Commission's Rules after the seven-month period in 1982-1983 (Neilson, SPS Ex. 1, Attachment D, at 38-96). Indeed, since December 1983, the station has regularly broadcast 15-17 hours a day or 109 hours per week. (*Id.* at 49-96) This evidence refutes any suggestion that the School System would willingly reduce its operations in the near future; rather all indications are that the program will continue, or grow, with time (Neilson, Tr. 905).

205. *School Board Commitment* : Mr. Neilson testified that he has a clear understanding from his supervisors that they are pleased with the manner in which the radio communications program has been run since he became General Manager in October 1983, and that they are committed to operating the station in the future as they have in the recent past (Neilson, SPS Ex. 1, para. 71; Neilson, Tr. 912). Mr. Neilson further testified that the School Board has unequivocally recognized the value of the radio station as an educational tool and has made a firm commitment to continue its support for the program in the future (Neilson, SPS Ex. 2, para. 71).

206. Mr. Vassar confirmed the Board's position on this matter. As noted above (para. 153), he testified that it was his view that the action taken by the Board in February 1983 reflected a commitment to provide the necessary funding to operate the station at least 84 hours a week whether or not the station provided any funds from underwriting or other fundraising activities (Vassar, Tr. 1172; *see also* Vassar, SPS Ex. 3, para. 13). He also testified that on July 2, 1986, the School Board adopted a resolution which recognized KNHC as an integral component of the radio communications program and which resolved to maintain the then-current level of operation (in excess of 100 hours per week). (Vassar, SPS Ex. 3, para. 13 & Attachment B) Among other things the resolution provides: "Reduction of the station's operating hours or sharing of the frequency with another FCC licensee would seriously jeopardize attainment of the educational goals of the radio communications program and implementation of the District's desegregation plan by decreasing the opportunities for students to gain hands-on broadcasting experience, by causing confusion in the listening audience, and by compromising the character of the radio station as a mirror of the commercial broadcasting industry, thereby decreasing its educational utility" (Vassar, SPS Ex. 3, Attachment B at 1).

THE CONSTRUCTION PERMIT APPLICATION OF JACK STRAW MEMORIAL FOUNDATION

207. Jack Straw is a non-profit Corporation headquartered in Seattle, Washington. The Corporation is governed by a Board of Trustees consisting of eleven members drawn from different walks of life (Margason, JS Ex. 2).[12] From 1964 to 1984, Jack Straw was the licensee of KRAB(FM), a listener- supported radio station in Seattle, which was operated as a noncommercial station on commercial frequency 107.7 MHz (Margason, JS Ex. 1, at 1; *see also* Margason, Tr. 1573-1575). As a result of a series of financial crises in the early 1980's Jack Straw sold its rights to its commercial frequency and developed a plan to return to broadcasting on a noncommercial frequency, using the proceeds of the sale as an "endowment" (Margason, Tr. 1665).[13]

208. Jack Straw is an educational organization, rather than an educational institution (*See* Margason, JS Ex. 1, Attachment 1). Accordingly, it was required to provide evidence demonstrating that it has an educational program and that its proposed use of the reserved frequency will advance that program. In addition, Jack Straw's evidence should demonstrate that its proposed operation of the station will meet community needs, and it may show other factors that warrant a grant of its application. *Memorandum Opinion and Order*, FCC 86-318 at para. 10 (released July 14, 1986).

A. Integration of Jack Straw's Proposed Station Into the Organization's Educational Program

209. A statement of Jack Straw's educational program can be derived only from the testimony of its representatives in this proceeding. No pre- existing statement of its educational program was offered in evidence.

210. The clearest statement of Jack Straw's educational program appears in Jack Straw Exhibit 1, where Board Member Gary Margason testified that Jack Straw's educational program is one of "filling the gaps -- of supplementing the other stations not competing with them. . . ." (Margason, JS Ex. 1, at 4). The philosophy underlying this goal is that the introduction to new or different music, language, or ideas expands the mind; hence, exposure to that which is different is an enriching or educational experience (Sinclair, Tr. 1822-1830). Consistent with this philosophy, the organization proposes to advance its educational program by broadcasting programming -- mostly music and other nonentertainment programming -- that, according to Jack Straw, is otherwise unavailable in the Seattle media (Margason, JS Ex. 1, at 4; Margason, Tr. 1604-1606).

211. As part of its showing under this issue, Jack Straw submitted a proposed program schedule for a sample week (Sinclair, JS Ex. 3, Attachment 3). The proposed schedule was derived primarily from a 1983 program guide for KRAB. Indeed, with very few exceptions, all of the programs proposed for the future were the same programs (and typically in the same time periods) as the programs broadcast on KRAB before the station was sold in 1984 (Sinclair, JS Ex. 3, Attachment 3 & 4; *see* Tr. 1751-1752).

212. Jack Straw's proposed program schedule consists of 131.5 hours per week (Sinclair, Tr. 1989-1990). Elizabeth Sinclair, Jack Straw's principal programming witness, was asked about each of the programs in the schedule (Sinclair, Tr. 1851-1984). She acknowledged that 95 hours of programming (72 percent of the total) involves music, with large blocks of time devoted to jazz (20.5 hours) and folk music (18 hours), and 56.5 hours consisting of "other" music, including music of other countries (*e. g.*, India, Turkey and other countries), gospel music, blues, classical music, vintage rock, reggae, East Texas country music, and fusion jazz (Sinclair, Tr. 1936-1937, 1970, 1986, 1988-1989, 2052). An additional 15 hours of programming each week consists of repeats of some of the music programs (Sinclair, JS Ex. 3, Attachment 3; Sinclair, Tr. 1990), for a total of 84 percent music programming. The remaining 21 hours in the proposed schedule consist of a mix of readings, poetry, conversations, children's programming, news broadcasts, public affairs, and general informational programming (Sinclair, Tr. 1990).

213. Ms. Sinclair acknowledged that the proposed schedule contains no instructional programming (Sinclair, Tr. 1841; *accord* Margason, Tr. 1711-1713). Likewise, there is little or no programming in the proposed schedule that can be categorized as "general educational," as that term is used by the Commission. When Ms. Sinclair appeared at the hearing, she testified that Jack Straw's music programming should be logged as "general educational", because these programs usually contain commentary or are otherwise presented in a way that is educational to the uninitiated (and often to the initiated as well). (*See* Sinclair, JS Ex. 3 at 4; Sinclair Tr. 1822, 1846-1851). She was then shown copies of KRAB's program logs listing some of these same programs, but categorizing them as "performing arts" or "light entertainment." (*See* , *e. g.*, Sinclair, Tr. 1857-1858). Nonetheless, Ms. Sinclair persisted in claiming that these same programs, when broadcast in the future, would be properly logged as "general educational." (*See* , *e. g.*, Sinclair, Tr. 1857-1858).

214. When Ms. Sinclair was directed by the Presiding Judge to apply the Commission's logging definitions for noncommercial stations, rather than her own view of what may or may not enhance understanding or awareness (Sinclair, Tr. 1859-1861), she conceded that Jack Straw's music programs would properly be logged as "performing arts" or "light entertainment." (*See* , *e. g.*, Sinclair, Tr. 1861). On re-direct examination, however, Ms. Sinclair changed her testimony again, stating that Jack Straw's mission was to operate an educational station; that these programs were designed to be educational within the meaning of Jack Straw's charter; and that therefore they should be logged as "general educational" (Sinclair, Tr. 2165-2169, 2198). Yet Ms. Sinclair was not able to explain how Jack Straw's mission today differs from its mission in 1983, or how the programs that would be broadcast in the future differ from those broadcast in 1983; nor was she prepared to say that these programs had not been properly logged in 1983 (Sinclair, Tr. 2167-2171, 2198, 2239-2240).

B. *Jack Straw's Proposal for Meeting Community Needs*

215. Jack Straw asserts that its programming proposal is designed to meet unmet needs in the community (Margason, JS Ex. 1, at 1). As is discussed below, however, the unmet needs that Jack Straw seeks to satisfy are primarily programming needs, not the needs and interests of the community as that phrase is used by the Commission in evaluating the public service aspect of a licensee's performance.

216. Despite repeated references in Jack Straw's testimony to its ascertainment efforts, it is clear that Jack Straw did not itself conduct a survey of community leaders or of the general public to determine the issues of concern to the residents of Seattle (Margason, Tr. 1599-1604, 1609-1611; Sinclair, Tr. 2027-2028). Nor, when KRAB was on the air, did representatives of Jack Straw attend the regular monthly ascertainment meetings of community leaders held by Seattle's commercial television stations, to which all area broadcasters are invited (Margason, Tr. 1601-1602). There is in fact no evidence that Jack Straw has sought to identify the top ten issues of concern to Seattle residents; indeed, at the hearing, Jack Straw's witnesses could not identify any of them (Sinclair, Tr. 2015-2017).

217. When asked about what Jack Straw did in the area of ascertainment, Jack Straw's witnesses testified that the organization maintains regular contact with a variety of ethnic cultural, arts, and "cause" organizations in Seattle, through which Jack Straw learns of the programming interests of such organizations (Margason, Tr. 1599-1601). In addition, the Jack Straw staff has reviewed local newspapers and periodicals and scrutinized the other electronic media "to determine what needs are not being addressed by other media . . . ." (Sinclair, JS Ex. 3, at 1) Finally, when KRAB was on the air, Jack Straw conducted a survey of its listeners to determine their programming preferences, which it relied on in developing the 1983 program schedule that formed the basis for its proposal for the future (Margason, Tr. 1605-1606).

218. On cross-examination, the Jack Straw witnesses were asked questions designed to determine whether they understood the difference between ascertaining community needs and interests (such as the economy, crime, health, etc.) and eliciting listeners' preferences for a particular type of programming (such as reggae or East Texas country music rather than top 40 or classical music).

(Margason, Tr. 1602-1603; Sinclair, Tr. 2013-2052, 2062-2068, 2071- 2083, 2218-2237). The witnesses, for the most part, appeared either not to understand the distinction or were unwilling to acknowledge it (Margason, Tr. 1611; Sinclair, Tr. 2013-2052, 2062-2068, 2071-2083, 2218-2237). Thus, Jack Straw's avowed goal of meeting unmet needs must be understood to be one of providing a type of music that is not being offered by the other stations in Seattle rather than providing programming that is responsive to the needs and interests of the community.

219. Moreover, Jack Straw's programming proposal contains only a limited number of programs that could properly be considered issue-responsive as the Commission uses the term (*see* Sinclair, Tr. 1079-2080). Among other things, Jack Straw proposes to broadcast a two-hour "public affairs" block on Monday evenings, consisting of "lectures . . . on historical, political and international issues; interviews with prominent historians, scholars and political figures; and documentaries on topical public affairs issues" (Sinclair, JS Ex. 3, Attachment 3 & 4). When Ms. Sinclair was asked at the hearing about the specific programs to be broadcast in this time slot, she responded that Jack Straw has "developed a fair amount of programming which has been recorded over the last year and is currently available in our archives. . . ." (Sinclair, Tr. 2213). Examples of such recorded programs include a series entitled "Famous Trails in Washington History"; a series of lectures from a 1985 conference on regional history sponsored by the Pacific Northwest Historians Guild with titles such as "Nineteenth Century Northwesterns," "Women of Principle," and "Northwest Land and National Needs"; a documentary entitled "The New Americans," which explores the life of immigrants to New York City over 100 years ago (Sinclair, Tr. 2228-2234); and two series produced by other institutions -- one on Native Americans produced by the American Museum of Natural History and another entitled "Radio Smithsonian." (Sinclair, Tr. 2215- 2217). Absent a list of the most significant issues of concern to the Seattle community, it is not possible to say that the programs in this two-hour block are issue-responsive; based on their titles and descriptions, however, it appears they are unlikely to qualify as such.

220. Jack Straw proposes two other programs -- "Commentary" and "Common Ground" -- that would be classified as "public affairs" by Ms. Sinclair (Sinclair, Tr. 1844-1846, 1909, 1929-1930). "Commentary" is a 15-minute program of "opinion and thought," which will be combined with a 15-minute news segment (*see* para. 221, *infra)* and will be aired Monday through Friday evenings at 7:00-7:30 (Sinclair, Tr. 1909; Sinclair, JS Ex. 3, Attachment 4). "Common Ground" is a 30-minute recorded series from the Stanley Foundation, which focuses on international issues and will air on Tuesdays at 8:00 p.m. (Sinclair, JS Ex. 3, Attachments 3 & 4).

221. As noted, Jack Straw proposes to combine a 15-minute news program with "Commentary" each weekday evening (Sinclair, Tr. 1908-1918). On Monday, Tuesday, and Thursday, the news segment will consist of international news drawn from short wave radio (Sinclair, Tr. 1909-1912). On Wednesday and Friday, the news segment will consist of locally produced 15-minute news program (Indian News" and "Red Survival" respectively) that focus on issues of interest to Native Americans (Sinclair, Tr. 1913-1915). In addition, Jack Straw will broadcast the Pacifica Radio Network news five evenings a week (Monday through Friday, 7:30-8:00 p.m.) (Sinclair, Tr. 1918-1920). Two mornings a week Jack Straw will carry another international news program taken from short wave radio broadcasts (Sinclair, JS Ex. 3, Attachment 3; Sinclair, Tr. 1881-1883). In short, Jack Straw proposes only two 15-minute news segments each week that will be locally produced (Indian News" and "Red Survival) (Tr. 1913-1915). Although Jack Straw has "future plans" for other local news programs, Ms. Sinclair testified that such programs are expensive and that Jack Straw had not developed any other local news programs at the time it submitted its program proposal in this proceeding (Sinclair, Tr. 1914).[14] Jack Straw also introduced no evidence with respect to its plans, if any, for soliciting, screening, selecting, or producing PSAs.

Comparative Coverage

222. The parties submitted a jointly sponsored engineering statement and maps prepared by Jack Straw's consulting radio engineers, which showed the comparative coverage of the two applicants' facilities, including the first and second service areas and populations,[15] to be provided by Jack Straw if its application were granted (Jt. Ex. 1).

223. The following chart illustrates the total areas and populations within each applicants' proposed 60 dBu contour (JS Ex. 4):

APPLICANT	AREA (Sq. Mi.)	POPULATION
Jack Straw	3,633	1,878,765
KNHC	801	1,261,824

224. The following charts depict the first through fifth noncommercial educational services the applicants would provide within their proposed 60 dBu contours (JS Ex. 40; Jt. Ex. 1):

SERVICE	AREA (Sq. Mi.)	POPULATION
JACK STRAW		
1st Service	209	11,778
2d Service	484	81,314
3d Service	1,257	340,028
4th Service	226	247,946
5th Service	433	742,185
KNHC [16]		
1st Service	0	0
2d Service	97	15,378
3rd Service	398	288,013
4th Service	141	83,517
5th Service	354	640,511

225. The first and second service that Jack Straw would provide is predicated upon the technical proposal contained in its application (Jt. Ex. 1, 4). Questions were raised during the course of the hearing as to whether Jack Straw would be able to effectuate its technical proposal in view of a moratorium imposed by King County on the construction of radio transmission facilities on the tower site proposed by Jack Straw pending adoption of an ordinance imposing more stringent RF radiation standards (Tr. 2468-2471. The moratorium was slated to expire on June 27, 1987. However, as of this date, the moratorium appears to be still in effect. The Presiding Judge ruled that Jack Straw would not receive comparative coverage credit unless it established that it would be permitted to con-

struct and operate its proposed 145 foot tower at its Cougar Mountain site. Jack Straw was given until April 7, 1987 to obtain a affirmative response from King County officials that it could implement its technical proposal (Tr. 2701-2703).

226. Jack Straw's "Memorandum In Support Of Coverage Evidence" filed April 7, 1987 does not establish that it can implement its present proposal. Jack Straw has not obtained a statement from King County that in the absence of the moratorium, it would receive the necessary conditional use permit[17] or demonstrated that it could implement its present proposal consistent with the 200uW/cm2 expected radiation standard for King County as a whole[18] or the 110uW/cm2 standard which currently is in place for Cougar Mountain.[19] Jack Straw is clearly aware of the 110uW/cm2 standard since it was the applicant in the case in which it was adopted. Indeed, its engineering statement acknowledges that it is the standard governing the 300 foot Sunbelt tower.[20] Having based its coverage showing on the proposal in its application, Jack Straw's obligation was to show that its proposal could be implemented. It has failed to do so. Further, the available evidence indicates that it can not meet the 110uW/cm2 standard with the tower and antenna system which it has proposed.[21] Therefore, its comparative coverage claim will not be credited.

Share - Time Issue (Issue 3)

227. To assist in determining whether a share-time arrangement would serve the public interest and, if so, the terms of such an arrangement, the Presiding Judge directed the parties to submit evidence setting forth the hours of operation each required in order to achieve its educational objectives (Tr. 55-56, 165-167). In response to this directive, the School System stated its position that, if a share-time arrangement is ordered, the School System should retain those hours that it now regularly schedules, with a sufficient break to avoid audience confusion, and that Jack Straw be given the rest (Vassar, SPS Ex. 3, para. 25). As of the time of the hearing, the hours regularly scheduled by the School System were 8:00 a.m. to 11:00 p.m., Sunday through Thursday, and 8:00 a.m. to midnight, Friday and Saturday, 52 weeks a year (*Id.* ; Neilson, SPS Ex. 1, para. 25).[22] Jack Straw's position, on the other hand, was that if a share-time arrangement is ordered, the School System should be given only school hours (basically 8:00 a.m. to 3:00 p.m.) on school days (Monday through Friday) during the school year (September to May), and that all other hours be given to Jack Straw (Margason, JS Ex. 35, at 1-2).

The School System's Basis for Its Proposed Operating Schedule Under a Share - Time Arrangement

228. The School System submitted testimony from Mr. Vassar and Mr. Neilson setting forth the reasons why the School System believes it must maintain its current operating schedule in order to meet its educational objectives.

229. Both Mr. Neilson and Mr. Vassar testified that a full-time operating schedule is essential if the radio communications program is to remain the mirror of the commercial industry that it is intended to be (Neilson, SPS Ex. 1, para. 69; Vassar, SPS Ex. 3, para. 22). All of the elements that go into producing the station's 15- to 16-hour daily broadcasts enhance the validity of the students' vocational educational experience and hence the overall educational value of the program. These elements include the need to select and/or produce programming for the extended day, the responsibility for ensuring that the station runs smoothly and professionally throughout the day, the longer air shifts, which are available only after school, on weekends, and during school holidays, and the knowledge that one is operating a real radio station with a real audience (Neilson, SPS Ex. 1, para. 69; Vassar, SPS Ex. 3, para. 22; Kyle, SPS Ex. 28, para. 2). Because KNHC is a real, full-time radio station, the radio program graduates are known to be well-trained and are welcomed into the broadcast industry (Vassar, SPS Ex. 3, para. 22; *see* paras. 65-66, 170, *supra).*

230. In addition, operation of the station beyond school hours provides an important motivation for the students – namely, the opportunity to broadcast when the student announcers' peers are able to listen (Neilson, SPS Ex. 1, paras. 69-70). During school hours, school-aged children are generally in school and not listening to the radio. Knowing that their friends and colleagues are listening after school and on weekends motivates the students to strive for perfection, and that extra effort contributes to the professionalism that distinguishes the graduates of the radio program (Neilson, SPS Ex. 1, para. 69; Vassar, SPS Ex. 3, para. 23). That motivating force would be diminished if the School System's program were reduced to school hours/school days (Vassar, SPS Ex. 3, para. 23).

231. Similarly, reducing the School System's operating hours to school hours/school days would diminish the ability of KNHC to meet the needs and interests of its listening audience through its programming. The station's entertainment programming is geared to teens and young adults, and the station is very popular with these age groups, as evidence by the station's listings in the Birch Reports over the years (Neilson, SPS Ex. 1, para. 70; Vassar, SPS Ex. 3, para. 23; Neilson, Tr. 891-892, 895-897; Neilson, SPS Ex. 82). Having established an audience, the station can reach these people with its nonentertainment programming. While KNHC's public affairs programs address a wide range of issues of concern to the residents of Seattle, the station makes an extra effort to address issues of concern to tean-agers and to offer a teen perspective on issues of broader concern. One sign of its success in this regard is that community leaders who want to reach teens and young adults have come to KNHC to address such issues as teen suicide and a teen curfew in Seattle (Neilson, SPS Ex. 1, para. 70; *see also* Massingale, SPS Ex. 36, paras. 4-5). For the most part the young people KNHC seeks to reach with its nonentertainment programming are in school during the school hours and cannot begin to listen to the station until after school and on weekends. Therefore, if the station's hours were restricted to school hours/school days, it would not be able to communicate with young people on issues of importance to them as effectively as it has in the past (*Id.* ; Vassar, SPS Ex. 3, para. 23).

232. The full-time operating schedule also ensures that the program can accommodate the need for air shifts by all students who want on-air experience, including students whose schedules do not permit them to sign up for the program during the school day, student who have received their basic training in the Cleveland program but who cannot commute from Cleveland to the north end during the school day, students who want to maximize their on-air opportunities to enhance their abilities, or a combination of these factors. *See* , *e. g.*, Higbee, SPS Ex.

23, para. 5 (I was already very involved in the music program and the honors program at Hale and couldn't afford to give up any school hours for the communications program. . . . I really gained a lot from the program even though I wasn't enrolled on a formal basis.); Schall, SPS Ex. 49, para. 7 (The more a station parallels a commercial station, the better the training. The best way to imitate the training gained at commercial stations is to give students the opportunity to be on the air for full-length shifts. The after school and weekend hours are needed to give the students the opportunity to work these longer shifts. There are more tasks to be done during the long shifts, such as logging, monitoring, and meter reading.); Hu, SPS Ex. 24, para. (Although my involvement in the radio program is very important to me, I don't want it to interfere with my other courses at Hale, so I am enrolled in the after school class, and I appear on the air after school and on the weekends. If these hours weren't available to me, I probably wouldn't be able to fit the radio station into my schedule.) (*See also* McCann, SPS Ex. 37, para. 1; Vassar, SPS Ex. 3, paras. 22-23; Wang, SPS Ex. 4, para. 12)

233. Finally, representatives of the School System testified that the School District, the parents of the students, and the community generally, take great pride in the fact that its students operate one of the most popular radio stations in Seattle (Neilson, Tr. 906; Vassar, SPS Ex. 3, para. 24; *see* Neilson, SPS Ex. 82). If the station's hours were cut back and the station's popularity declined as a result, this sense of pride would be gone (Vassar, SPS Ex. 3, para. 24).

Jack Straw's Basis for Its Proposed Operating Schedule Under a Share - Time Arrangement

234. Jack Straw submitted a proposed operating schedule for a share- time arrangement that was derived unchanged from the written share-time proposal it had given to representatives of the School Board in 1983 (Margason, Tr. 1624-1525; *see* Vassar, SPS Ex. 3, para. 12).[23] This arrangement would reduce the School System's operation of KNHC to school hours/school days only (Margason, JS Ex. 35, at 1-2). In addition, Jack Straw stated that the School System could operate the station during the summer months as in the School year – 8:00 a.m. to 3:00 p.m. weekdays – "[i]f the School System establishes that the station is used for vocational training purposes in the summer months as well." (*Id.* at 2.) Finally, Jack Straw said it would "entertain proposals to provide training opportunities for students or to broadcast student-produced programs" during the hours that were assigned to Jack Straw. (Id.)

235. Jack Straw did not submit a justification for its proposed schedule based on the hours it need to achieve its educational objectives. Rather, it justified its proposed schedule on the basis of an unsubstantiated assumption about the School System's need for the station and on the basis of Jack Straw's financial, as opposed to educational, needs (Margason, JS Ex. 35 at 1-2).

236. Jack Straw stated its proposal was based on the premise that the School System "authorized funding for and used" the station only for vocational training carried out "when students and teachers were at school" (Margason, JS Ex. 35 at 1). When questioned by the Presiding Judge at the hearing, Mr. Margason acknowledged that this premise was based on what he believed to be the case as of 1983; that he had not verified the premise since that time; that he did not know whether these statements accurately characterized either the present circumstances or the recent past; and that until the discovery phase of this case, he had been unaware that KNHC had operated at least 12 hours a day since 1980, with the exception of the seven-month period in 1982-1983 (Margason, Tr. 1648-1658).

237. As its second justification for its proposed operating schedule, Jack Straw stated that it will need "morning and/or afternoon drive time" to attract the audience essential to a listener-supported station (Margason, JS Ex. 35 at 1). Representatives of Jack Straw testified that, without drive time, it probably could not "maintain the listener base which would be essential for its long-term survival." (*Id.*) However, Jack Straw did not offer ratings figures of any kind to demonstrate that, when KRAB was on the air, its listenership was substantial during either of the drive times. Indeed, Jack Straw's own witness offered as evidence on a different point a KRAB newsletter that stated that KRAB's listenership during this period (when it carried basically the same program schedule as that proposed here) was insufficient to support its operations (JS Ex. 36). Indeed, ratings data from these years, which were subsequently submitted at the request of the Presiding Judge, indicate that KRAB had not even met the threshold for inclusion in the ratings data (Neilson, SPS Exs. 81, 82).

Misrepresentation Issue - Jack Straw [24]

238. On April 20, 1983, Jack Straw negotiated an agreement with Sunbelt Broadcasting, Inc. (Sunbelt)[25] for the sale of assets and assignment of license of Station KRAB (Tr. 2256-2258). Section 1 of the Purchase Agreement provided, in relevant part, that Jack Straw would transfer a parcel of real property which included Station KRAB's transmitter, antenna tower and antenna (JS Ex. 37, pp. 1-2). The Cougar Mountain real property was sold free and clear of all liens, encumbrances and/or restrictive covenants except:

> (b) the reservation by Seller of a use of the property as a site for an antenna, transmitter and studio link such reservation to be included in the deed of sale; and
>
> (c) such other restrictive covenants, reservations, reservation of easements, reservation of mines rights and rights of way of record and all applicable zoning regulations restrictions and requirements . . . .[26] *Id.* at 2.

239. In June, 1983, Jack Straw filed an application (File No. BALED- 830602GR), to which the Purchase Agreement was attached, requesting Commission consent to the proposed assignment of license to Sunbelt. *See* JS Ex. 16B, Tr. 2404.

240. The application was opposed by Community for KRAB Radio (Community) on July 28, 1983. Community alleged, *inter alia*, that the proposed assignment (and specifically Section 1 of the Purchase Agreement, *supra)* would violate Section 73.1150 of the Commission's Rules which provides that "the licensee may retain no right of reversion of the license, no right to reassignment of the license in the future, and may not reserve the right to use the facilities of the station for any period whatsoever." *See* also Tr. at 2471-2472.

241. Jack Straw opposed the Petition to Deny's allegation by maintaining that Jack Straw had retained not a prohibited reversionary right, but "the right to use a part of the Cougar Mountain antenna location for its new broadcast facilities if and when they are obtained." JS Ex. 16B at p. 17 (Affidavit of Gary Margason).[27]

242. On January 3, 1984, Jack Straw filed the application which is the subject of this proceeding. *See HDO*, para. 1. The application proposed the construction of a new tower, located on the Cougar Mountain site, to support Jack Straw's transmitting antenna (Tr. 2330-2331, 2459-2460, 2486).

243. By letter dated February 8, 1984 (JS Ex. 16A and Tr. 2288-2289) the Chief, Audio Services Division of the Mass Media Bureau (the Bureau) denied Community's Petition and granted Jack Straw's application to assign the license of Station KRAB to Sunbelt. As part of this ruling, the Bureau held that the Purchase Agreement between Jack Straw and Sunbelt did not contemplate Jack Straw's retention of any prohibited reversionary interest: "Jack Straw has reserved a right to co-locate whatever facilities it may acquire at KRAB-FM's present site. No interest has been retained in KRAB-FM's license or use of the facilities" (JS Ex. 16A at p. 3).

244. Pursuant to the Commission's consent, Jack Straw and Sunbelt proceeded to consummate the proposed assignment on April 13, 1984. Among the documents executed at closing on that date were a Reservation of Rights To Use Transmitter Site (JS Ex. 16F) and a Statutory Warranty Deed (JS Ex. 16E). The Reservation of Right, entered into pursuant to Section 1 of the Purchase Agreement, reserved to Jack Straw "the non-exclusive, but priority, use of the property being sold and assigned as a site for an antenna, transmitter and studio link as follows:

> 1. On the existing antenna tower or any replacement tower sufficient space to permit the installation of a FM transmitter antenna and antenna(s) for a studio-transmitter link in accordance with good engineering standards.
>
> 2. Sufficient space in the existing or any replacement transmitter building or, alternatively, enough land next to the antenna tower to erect a separate transmitter building sufficient to hold an FM transmitter capable of producing 100kw ERP and related equipment as well as the transmitting and receiving equipment necessary for the studio transmitter link." JS Ex. 16F.

The Statutory Warranty Deed reserved to Jack Straw, "the non-exclusive right to install an antenna, transmitter and studio link at or upon the existing tower located upon the premises described herein . . . ." (JS Ex. 16E).

245. Pertinent sections of the Reservation of Right and Statutory Warranted Deed (JS Ex. 16E and F) were paraphrased in an Opinion of Counsel letter which was attached to Jack Straw's Petition For Leave To Amend and Leave to Submit Additional Information, (Petition for Leave to Amend), filed on March 10, 1986 (JS Ex. 16C, p. 20). The Petition for Leave to Amend was responsive to a directive contained in the *HDO* that Jack Straw determine whether the operation of its proposed facility would result in radio frequency (RF) radiation levels which exceeded Commission guidelines and thus constituted a major environmental action within the meaning of Section 1.1305(d) of the Commission's Rules.

246. The Engineering Report submitted with the Petition for Leave To Amend stated that the facilities proposed by Jack Straw at Cougar Mountain would not produce excessive RF radiation, in areas accessible to the public, when the power density level of Jack Straw's proposed facility was added to the power density levels of Stations KMGI (the Sunbelt station), KMPS, and KZOK, which already had transmitting antennas on the Sunbelt tower. As part of the same Engineering Report, Jack Straw also considered alternate proposals for the Sunbelt site, including proposals to construct a new, taller tower on which the antennas of Jack Straw and the three existing FM stations would be mounted, along with the television antenna of KONG-TV, proponent of a Channel 16 UHF television station in Seattle[28] (JS Ex. 16C, pp. 13-15).

247. The amendment to Exhibit VB-22 of Jack Straw's application went on to point out that, based upon the attached Opinion of Counsel, Jack Straw had a "priority right of use" ahead of KONG-TV and Station KMGI. The amendment further stated that if the stringent radiation guidelines of King County were exceeded by the combined operation of, among others, four FM and one TV station, Jack Straw's priority right of use would require that either KONG-TV or KMGI-FM or both would first have to vacate to satisfy the County's guideline before Jack Straw's proposal would come into play (JS Ex. 16C, p. 18).

248. Jack Straw's Petition for Leave to Amend was opposed, in part, by the School System, which argued that the alternative proposals which Jack Straw considered were not properly before the Commission, and that statements about the nature of Jack Straw's right to use the Sunbelt site, although made in the context of discussing these alternative proposals, conflicted with Jack Straw's statements about the nature of its right which it had made in its 1983 Opposition to Petition to Deny. Specifically, the School System argued that the apparent inconsistency between Jack Straw's characterization of its right to displace its assignee, KMGI, from the Sunbelt site in its 1986 post-designation amendment and its earlier characterization in its 1983 Opposition to Petition to Deny of its right to "co-locate" its facilities with KMGI warranted further inquiry. The School System requested the addition of a misrepresentation issue against Jack Straw in order to explore and resolve this alleged inconsistency.

249. At the prehearing conference held on April 18, 1986, the Presiding Judge accepted the portions of Jack Straw's amendment which related to the proposal set forth in its application, but rejected, as hypothetical, the Opinion of Counsel and the portions of the Engineering Report which related to alternative proposals for the Sunbelt site (Tr. at 5). By *Memorandum Opinion and Order*, FCC 86M-2665 (released August 29, 1986) the Presiding Judge agreed that there was an apparent conflict between the 1983 assertion of Jack Straw's counsel that Jack Straw had a right to "co-locate the Foundation's new FM facilities at KRAB's present site" and the assertions, contained in the 1986 Petition for Leave to Amend (specifically Exhibit VB-22 and the Opinion of Counsel), that Jack Straw had a "priority right" of use with respect to Sunbelt. After concluding that, "In the absence of a satisfactory explanation, further inquiry is merited," the Presiding Judge added an issue:

To determine whether, in its opposition to a petition to deny, the KRAB assignment application or in a proposed amendment to the present application, Jack Straw Memorial Foundation has misrepresented its intentions with respect to its contract right to co-locate any new facilities it might acquire with the facilities of its assignee, Station KMGI, and, if so, to determine the effect of such misrepresentation on Jack Straw Memorial Foundation's basic qualifications to be a Commission licensee.

250. At the hearing, Mr. Margason testified that an essential part of Jack Straw's plan in assigning Station KRAB had been to reserve a permanent right to use the Cougar Mountain property as a transmission site because Jack Straw was planning to go back on the air hopefully in the near future (Tr. 2259). Jack Straw told Sunbelt about its need to reserve a permanent right to use the Cougar Mountain site, and Sunbelt agreed to permit Jack Straw to reserve such a right (Tr. 2261-2262). There was no discussion of any possible limitation on the right which Jack Straw would reserve (Tr. 2262), no specifics were negotiated (Tr. 2320), and Jack Straw believed that it was asking for and obtaining right to use the Cougar Mountain site (Tr. 2320, 2391-2392) without any reservation. There was no thought at the time about the priority of Jack Straw's rights over the other users (Tr. 2392). The Purchase Agreement which was entered into on April 20, 1983 granted Jack Straw the right to reserve "a use of the property as a site for an antenna, transmitter and studio link such reservation to be included in the deed of sale" (JS Ex. 37 at 2).

251. In response to Community's Petition to Deny Jack Straw's July 2, 1983 assignment application, Jack Straw asserted in the affidavit of Mr. Margason that it had retained "the right to use a part of the Cougar Mountain antenna location for its new broadcast facilities if and when they are obtained" (JS Ex. 16B at p. 17; see Tr. 2425-2426). At the time Mr. Margason executed his affidavit, the only document which he reviewed was the Purchase Agreement (Tr. 2309-2310; JS Ex. 37). Based upon the Purchase Agreement, it was Mr. Margason's understanding that Jack Straw had a right to use the Cougar Mountain location as a site from which to broadcast in the future (Tr. 2386). Jack Straw understood it's counsel's characterization of this interest as a right to "co-locate" to be a accurate description of the interest and to mean only that other stations currently used the site and that Jack Straw retained the right to use part, not all of, the Cougar Mountain location (Tr. 2289, 2450-2451).

252. While Jack Straw was never concerned that it had retained "a" right to use Cougar Mountain for "a" transmission tower for its proposed broadcast station (Tr. 2382, 2383), Jack Straw's experience during the year between entering into the Purchase Agreement and the closing led to a concern that nothing go wrong in spelling out its rights to use the Cougar Mountain site (Tr. 2266-2267). Jack Straw's experience in negotiating the security agreement with Sunbelt made Jack Straw fearful that it might, by oversight, draft its closing documents in such a fashion that Sunbelt could find a way to work around the simple language of the Purchase Agreement (Tr. 2405-2406). Jack Straw therefore asked its counsel to take extra precautions to protect the Foundation by assuring that the Reservation of Right and Warranty Deed protected and clarified the interests Jack Straw had reserved in the Purchase Agreement (Tr. 2408-2410). Mr. Margason wanted to make certain that Sunbelt did not breach Jack Straw's right to use the site and that Jack Straw would be able to use the site for broadcast transmission purposes; the issue of whether Jack Straw's rights were exclusive in nature did not concern him (Tr. 2299- 2300).

253. As executed, the Reservation of Right spelled out the fact that Jack Straw retained "the non-exclusive, but priority, use" of the property being sold and that it reserved on "the existing tower or any replacement tower sufficient space to permit the installation of a FM transmitting antenna and antenna(s) for a studio transmitter link . . . ." The Reservation of Right also reserved sufficient space for Jack Straw's transmitter in the existing or any replacement transmitter building or in a separate transmitter building to be erected next to the antenna tower (JS Ex. 16F; Tr. 2397). The Warranty Deed did not include the terms "but priority" not "any replacement tower." When Mr. Margason read the Reservation of Right and Warranty Deed at closing he did not notice the difference in wording (Tr. 2296, 2304-2305, 2409- 2413). Mr. Margason acknowledged these differences from the Reservation of Right, but had no explanation as to why the wording of the two documents executed on the same day was different (Tr. 2290-2296, 2304-2305).

254. After the consummation of the assignment of Station KRAB-FM in April, 1984, a number of other circumstances occurred which forced Jack Straw to consider and further refine its understanding of the nature of the rights which it had reserved. First, Jack Straw began to plan for the eventual practical effectuation of its reserved right of use (Tr. 2324). To this end, it communicated with Sunbelt within a few months after the April, 1984 closing to obtain an understanding of Sunbelt's plan to make sure that no disagreement between Jack Straw and Sunbelt arose with respect to the contractual obligations between them (Tr. 2324, 2326-2327, 2393-2394).

255. Second, some time after the closing of the KRAB-FM assignment, KONG-TV proposed to erect a new 300-foot tower at the Sunbelt site (Tr. 2327, 2462-2564). While the KONG-TV proposal would still have permitted the construction of the separate tower proposed by Jack Straw (Tr. 2382),[29] the taller tower proposed by KONG-TV offered the possibility of greater efficiency of operation (Tr. 2464-2465), and Jack Straw wanted to make sure that it was not given short shrift in the design of a new panel antenna which would accommodate FM users of the tower. Because of the nature of the panel antenna being proposed, Jack Straw felt it too might be accommodated on the tower, thereby eliminating the need for Straw to have a separate tower (Tr. 2344- 2345, 2462-2466).

256. Third, the KONG-TV proposal stirred litigation by residents on Cougar Mountain who were concerned that the new tower would result in excessive radiation exposure (Tr. 2325). The question of how radiation standards would affect Jack Straw's proposal – and of how responsibility for meeting various radiation standards would be allocated among the users of the Cougar Mountain site – was later given additional impetus by the Commission's designation of an issue to determine whether the Jack Straw proposal would constitute a major environmental action (PF, *supra* para. 244; Tr. 2270-2271).

257. To assist it in determining the exact nature of its rights in the context of these new circumstances, Jack Straw retained the services of Seattle attorney, David Stewart, and asked him to investigate the entire Cougar

Mountain situation (Tr. 2328, 2361-2362, 2395). Mr. Stewart was specifically asked to clarify the nature of the right Jack Straw had reserved pursuant to Section 1(b) of the Purchase Agreement (Tr. 2395). By letter dated September 11, 1984 Mr. Stewart sent Mr. Margason a "status report of the land use and building permit applications now pending with respect to the Cougar Mountain real property" which Jack Straw had sold to Sunbelt (SPS Ex. 75, p. 1). The report concluded that Jack Straw should continue to monitor closely the "extremely uncertain" status of land use and building permit applications at the Cougar Mountain site. Mr. Stewart also specifically mentioned the possibility of a moratorium on construction of any new broadcast towers or facilities in King County. *Id.*, p. 3. Mr. Stewart, however, assured Jack Straw that it had a "nonexclusive right to install and utilize the existing Cougar Mountain transmission facilities and any successor facilities" and that Sunbelt's conduct had been "entirely consistent" with its obligations to Jack Straw. *Id.*, p. 1.

258. Mr. Stewart wrote to Sunbelt on Jack Straw's behalf on July 17, 1985 to articulate a more specific statement of Jack Straw's reserved right to use the Cougar Mountain site and to remind Sunbelt that it had an obligation to include Jack Straw in the design of any new tower (JS Ex. 38; Tr. 2339- 2340, 2344-2345, 2357). At that time, Mr. Stewart articulated the position that "in the event of any conflict and/or restriction on usage rights of the existing or replacement transmitting and tower facilities on Cougar Mountain, Jack Straw Memorial Foundation's usage rights shall take priority over the usage rights of any other person or party, including Sunbelt Communications and any other(s) to whom Sunbelt Communications has granted usage rights." *Id.*

259. In a response dated August 20, 1985 counsel for Sunbelt acknowledged Jack Straw's rights contained in the Reservation of Right but declined to speculate what would occur in the event of a conflict (SPS Ex. 77; Tr. 2378-2380). In a subsequent letter dated January 30, 1986, Sunbelt President, Gary Fries, advised Jack Straw that plans for the panel antenna were going forward and invited Jack Straw's participation in the project.[30]

260. In an Opinion Letter dated March 6, 1986, Mr. Stewart also outlined for Mr. Margason "the contract and real property rights of Jack Straw in and to" the Cougar Mountain site (JS Ex. 16C, p. 20). The Opinion Letter was submitted as an attachment to Jack Straw's March 10, 1986 Petition For Leave To Amend. In substance, the letter construed the "non-exclusive but priority" right which Jack Straw had retained in the Reservation of Right to give Jack Straw an interest in the real property at Cougar Mountain which was "prior in right" to that of Sunbelt and KONG-TV, but subordinate to the leasehold interests of KZOK-FM and KMPS-FM. *Id.* at 21.

261. At the hearing, Mr. Margason acknowledged that Jack Straw's right as currently construed by its attorney, Mr. Stewart, included the right to require either KONG-TV or KMGI to vacate the site in the event of a conflict (Tr. 2328), but he denied that Jack Straw at any time had an intention or design of displacing any user of the site (Tr. 2355). He viewed any displacement that might occur not as the result of any Jack Straw's activity, but as a consequence of decisions Sunbelt might make by, for example, filling so much of the limited tower space that Sunbelt would have to go off the tower so that Jack Straw's expectation to come on the tower could be realized (Tr. 2364-2365). Jack Straw's current understanding of its rights differs from the understanding of those rights which it had in 1983 only in the degree of specificity (Tr. 2320). In 1983, Jack Straw simply thought that, no matter what, it had a right to use the Cougar Mountain property (Tr. 2320-2323), and that its rights were "strong" (Tr. 2298) or "good" rights that came ahead of the rights of others (Tr. 2355). It had not formulated its rights in real property terms of "priority rights" (Tr. 2355, 2392) or rights of "displacement" (Tr. 2355-2356), nor had it understood that its rights were themselves subject to any restrictions (Tr. 2268, 2270, 2451). According to Mr. Margason, the difference between the general characterization of Jack Straw rights in 1983 and the more specific characterization of those rights in 1986 thus represented a clarification of Jack Straw's rights and not a conflict or contradiction between two representations (Tr. 2451-2452, 2454, 2458).

CONCLUSIONS

262. This comparative noncommercial broadcast proceeding concerns the mutually exclusive applications of the School System which seeks renewal of its license to operate Station KNHC(FM) on reserved frequency 89.5 MHz, Seattle, Washington and the competing application of Jack Straw which seeks grant of an application for a construction permit for the same frequency. However, before evaluating the applicants, it must be first determined whether Jack Straw is qualified to be a Commission licensee. It is well established that only basically qualified applicants are entitled to comparative consideration. *Louis Adelman*, 28 FCC 432 (1960), *recon. denied*, 29 FCC 1223 (1960), *aff' d sub nom. Guinan, et al. v. FCC*, 297 F.2d 782 (D.C. Cir. 1960). The misrepresentation issue added against Jack Straw, therefore, needs to be now addressed.

Jack Straw Misrepresentation Issue

263. A misrepresentation issue was specified against Jack Straw based on an apparent conflict in statements made to the Commission regarding its contract and real property rights in and to its proposed transmitter site. Specifically, in an August 16, 1983, opposition to a petition to deny, Jack Straw stated that it had the right "to co-locate the foundation's new FM facilities at KRAB's present site." Thereafter, in a response to the *HDO*, Jack Straw filed a petition for leave to amend on March 10, 1986, that described its interest in the proposed transmitter site as a "priority right of use which gave it the right to require existing users to vacate the site." The disparity in the nature of Jack Straw's characterizations of its interest in the transmitter site resulted in addition of the issue.

264. The first statement -- that Jack Straw merely retained a right to co-locate -- reflected the fact that, when Jack Straw sold its rights to KRAB, it intended to reserve for itself a right to use the Cougar Mountain site if and when it return to broadcasting, without considering its right in relation to other existing or potential users of the site. However, during the period between entering into the Purchase Agreement for the sale of KRAB and the closing, Jack Straw became concerned about protecting its use rights at the Cougar Mountain site and, in turn, it sought to clarify -- indeed, to strengthen -- its rights. It succeeded to some extent, and the Reservation of Right (but not the Statutory Warranty Deed) described its right as a "non-exclusive but priority right . . . ."

265. Jack Straw's current interpretation of its interest in the Cougar Mountain site is that Jack Straw retained a priority right that would enable it to require an existing licensee, or any of its successors, to vacate the tower should a conflict arise over the use of the site. Jack Straw bases its more expansive interpretation of its right on the language of the Reservation of Right, and an Opinion of Counsel as to the meaning of the description of the right in that document, neither of which were in existence when Jack Straw filed its 1983 Opposition, but both of which it had before it filed the 1986 post-designation amendment.

266. In sum, it appears that the discrepancy between Jack Straw's characterization of its real property rights in 1983 and its characterization of those rights in 1986 resulted not from a desire or intent to mislead the Commission, but rather from a change in the nature of the right itself. Each statement was thought to be true when it was made. There is thus no basis for concluding that Jack Straw made false statements with an intent to deceive. Jack Straw is not disqualified on the basis of the designated misrepresentation issue.

267. The ultimate issue which now remains to be determined is whether grant of the renewal application of the School System, grant of the construction permit application of Jack Straw, or imposition of a share time arrangement between the School System and Jack Straw would best serve the public interest. Each of these considerations is discussed below.

The School System's Renewal Expectancy

268. Both the Commission and the courts have long recognized the differences between an incumbent licensee and a challenger in a comparative renewal case – namely, that the incumbent, upon a proper showing, is entitled to claim a renewal expectancy, which is given major weight in resolving the comparative issue. *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, *review granted in part*, 87 FCC 2d 900 (1981), *aff' d sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983); *Victor Broadcasting, Inc. v. FCC*, 727 F.2d 756, 765 (D.C.Cir. 1983).

269. The policy reasons for awarding a renewal expectancy are the same whether the station is commercial or noncommercial: (1) to reward the incumbent's proven performance; (2) to encourage investments to ensure quality of service; and (3) to foster stability in the broadcast industry. *Central Florida Enterprises v. FCC*, 683 F.2d 503, 507 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). The application of the first and third reasons to a noncommercial station is self-evident; the analogue of the second in a noncommercial context is to encourage educational broadcasters to maintain or expand their facilities and services – here, through the use of public funds – with the knowledge that they will likely have the frequency over a long period of time, rather than to make decisions with a short-term time frame in mind.

270. The parties are all in agreement that the renewal expectancy is applicable in the noncommercial context, as it is in the commercial context. There is a dispute, however, as to the standard against which the incumbent's performance is to be judged in determining whether a renewal expectancy is warranted. Past precedent cannot serve as a guide since this is a case of first impression. The Presiding Judge is aware of no other case involving a noncommercial applicant where renewal expectancy has been considered.

271. The Mass Media Bureau has used the standard generally applicable in the commercial context: namely, the responsiveness of the licensee's programming during the license renewal period to the ascertained needs and interests of the community. The Bureau concluded, based on KNHC's "substantial programming performance" that the School System was entitled to a renewal expectancy (MMB PC, para. 61). The Presiding Judge agrees with the Bureau's conclusion. However, the Bureau's focus is too narrow. Broadcast licensees, both commercial and noncommercial, must ascertain the needs and interests of their communities and must program to meet those needs. *Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants*, 58 FCC 2d 526 (1976); (1976 Ascertainment Statement) *Revision of Program Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 98 FCC 2d 746, 751 (1984) (1984 Public Broadcasting Report). However, unlike commercial licensees, the core obligation of licensees occupying channels reserved for noncommercial educational broadcasting is to serve educational purposes. *Eligibility for Noncommercial Educational FM and TV Broadcast Station Licensees, Notice of Inquiry*, 43 Fed. Reg. 30842, 30844- 30845 (July 18, 1978) (Processing Guidelines). The Bureau's analysis is incomplete since it has completely overlooked the educational aspects of the School System's stewardship.

272. Jack Straw advances the novel thesis that the primary obligation of a noncommercial educational licensee is to provide programming that is not being provided by commercial broadcasters in the market. It further asserts that this is a statutory obligation, and it is against this standard that the School System's claim of a renewal expectancy must be evaluated. Jack Straw's announced standard appears to be fashioned to fit its own performance as the licensee of KRAB, the model for its proposed operation if it is successful in this case. Indeed, Jack Straw claims, based on KRAB's past performance, that it is entitled to a renewal expectancy.[31]

273. The criteria for determining whether Jack Straw's standard has been satisfied is shrouded in mystery. Jack Straw has provided few clues. However, viewed from the perspective of KRAB's past performance and Jack Straw's proposal, some inkling can be gleaned. First, it appears clear that Jack Straw does not have in mind unmet educational needs. Jack Straw's proposed schedule contains no instructional programming and little or no programming that can be categorized as "general educational", as that term is used by the Commission (findings 213, 214). Alternative issue-responsive programming must also be discounted. The findings make clear that Jack Straw did not conduct a survey of community leaders or of the general public to determine the issues of concern to the residents of Seattle. There is in fact no evidence that Jack Straw has sought to identify the top ten issues of concern to Seattle residents; indeed, at the hearing Jack Straw's witnesses could not identify any of them (finding 216). Further, Jack Straw's programming proposal contains very little programming that could properly be considered issue-responsive as the Commission uses the term (findings 219, 220). What clearly emerges from the record is Jack Straw has in mind providing a type of music, which according to

Jack Straw, is not being offered by the other stations in Seattle. Consistent with this objective, 84% (115 hours) of Jack Straw's programming consists of music (finding 212).

274. Jack Straw's view that a noncommercial educational licensee's first obligation is to fill in the programming gaps left by commercial broadcasters and that the School System's past performance should be judged on that standard is rejected. Contrary to Jack Straw's view, there is no such mandate. Jack Straw's argument that the provision of the 1967 Public Broadcasting Act that are codified in Section 396(a) of the Communications Act supports its position is wholly misconceived. In its fifth subsection, cited by Jack Straw, Section 396(a) seeks to encourage programming which constitutes "an expression of diversity" and a "source of alternative telecommunications services for all the citizens of the Nation." 47 U.S.C. Section 396(a)(5) (1982). But the needs to be served are broadly stated as "the interests of people both in particular localities and throughout the United States," and the means of serving those needs are not restricted to programs not provided by commercial broadcasters or (as Jack Straw appears to believe) to programs whose audiences are too small to appeal to commercial broadcasters. *Id.* Indeed, the Senate Report accompanying the Act stated that noncommercial broadcasters "should not be so highly specialized . . . that it caters only to the most esoteric tastes." S. Rep. No. 222, 90th Cong., lst Sess., *reprinted in* 1967 U.S. Code Cong. & Admin. News 1772, 1778. Moreover, Congress demonstrably did not seek to alter the fundamentally educational character of public broadcasting. Rather, in its first subsection, Section 396(a) seeks to encourage "the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes." 47 U.S.C. Section 396(a)(1) (1982).[3233]

275. Programming of the sort that Jack Straw favors is of course permissible as one component of a broadcast service that meets the needs that an educational station is licensed to serve. That is the most that could be drawn from the excerpts, cited by Jack Straw, from the Commission's *1976 Ascertainment Statement* [34] to the effect that the "role of the noncommercial educational service has grown from purely 'instructional programming' to include a broader variety of 'public programming,'" and that "many public broadcasters can and do program to meet cultural and informational interests often given minimal attention by commercial broadcasters." 58 FCC 2d at 536. But the Commission's *1976 Ascertainment Statement* indicates on its face that such programming is neither the only means of fulfilling, nor the core of, the noncommercial broadcaster's obligation.[35] The 1978 *Processing Guidelines* make clear that, for educational institutions, the core obligation is to integrate the operation of the station into the institution's educational objectives and that, for educational organizations, the core obligation is to advance an educational program through "instructional" and "general educational" programming. 43 Fed. Reg. at 30845. In addition, the *1976 Ascertainment Statement* and the *1984 Public Broadcasting Report* [36] make clear that there is a further obligation, for both educational institutions and educational organizations, that is also shared with commercial broadcasters – namely, to provide programs responsive to community issues. *See* 58 FCC 2d at 526-527; 98 FCC 2d at 751-752. *See* also *Revision of Section 73. 3527 (a) (7) Relating To the Issues Program List for Public Broadcasting Licensees* (Issues- Program List), FCC 88-52, released March 4, 1988.

276. In fulfilling each of these obligations, the educational licensee will no doubt serve needs that the commercial broadcasting system may not meet adequately. Noncommercial licensees may have an interest and an ability to address issues that commercial broadcasters might ignore. So too, an educational institution that uses a broadcast facility to provide not only instruction for its students, but also an outlet for their self-expression and a service to the public designed and created from their special perspective, is serving needs that the commercial system cannot be expected to address. The touchstone is not (as Jack Straw would have it) whether the programs are in some sense similar to those presented by commercial stations. Issue- oriented programs, for example, are quite likely to be public affairs programs of the same general type as the public affairs programs broadcast by commercial stations; even the entertainment programs may be of the same general type. Rather, the critical question is whether the functions performed by the noncommercial stations are distinctive functions for which the reserved frequencies have been allocated.[37]

277. The Presiding Judge made clear at the outset of the hearing (see Tr. 149-150) and reaffirms that the proper test for measuring the School System's past performance during the license period (February 1, 1981 through January 31, 1984) is the same as specified in the designation Order for evaluating the two applicants, namely, the standard noncommercial comparative issue. That test, formulated in *New York University*, 10 RR 2d 215 (1967) and *Pacifica Foundation*, 21 FCC 2d 216 (Rev. Bd. 1970)[38] permits a full exploration of the School System's fulfillment of its educational objectives and its further obligation to provide programs responsive to community needs. Based on these factors, it is concluded that the School System has provided exceptional service to Seattle and is entitled to the greatest credit in terms of a renewal expectancy.

Past Integration of Station KNHC into the Educational and Cultural Objectives of the School System

278. The School System has established that the operation of Station KNHC during the license renewal period was fully integrated into the educational and cultural objectives of the School System. The primary educational objective of the School System's vocational education program in radio communication – of which Station KNHC was an integral component – was to teach students, through a comprehensive curriculum consisting of both coursework and hands-on experience, the basic operation, management, engineering, and programming of a broadcast station. The School System's radio communications curriculum covered the theory, history, law, and technology of broadcast communications as well as preproduction, production and post-production training for radio and television. The first level of the program consisted of traditional classroom "book learning"; the advanced level consisted of hands-on learning through operation of Station KNHC.

279. Consistent with the objective of the School System in preparing students for employment or further education in broadcasting and related fields, the station's operation was designed to mirror the operation of a commercial broadcast station (with the exception of airing commer-

cials). The station contained the full range of equipment one would expect to find in a commercial FM station of comparable size. The station's format – primarily music – is one that predominates among commercial stations, and the particular music selected for KNHC – "dance music" – was one that both attracted participation in the communications program and established an audience that the station sought to reach.

280. The station's student staff was divided into departments, each with discrete responsibilities parallelling those found in commercial stations, including ensuring compliance with all Commission and station policies; selecting and preparing music to be aired; writing, editing and reporting the news, including sports news; developing and producing public affairs programming for broadcast in response to ascertained needs; selecting and producing PSAs; reviewing and selecting broadcast materials received from outside sources; producing daily program and operations logs; assuring good relations with the general public and other media organizations; and assisting with the technical operation and safety of the station.

281. These day-to-day functions were carried out by students in the advanced classes, subject to the supervision of the instructor(s) of the radio communications courses and later the General Manager. In addition to their departmental responsibilities, some qualified advanced students became on-air announcers; while on-air announcing was a position that many worked hard to achieve, other students chose to remain behind the scenes and focus on the equally important but less "visible" aspects of running a radio station. In sum, the students enrolled in the program bore substantial responsibility, subject to supervision, for the operation of KNHC.

282. The responsibility for running the station – which extended beyond school hours, throughout evenings, weekends and holidays – taught the students not only the technical skills involved in operating a broadcast station, but also the social and personal skills that enabled them to work successfully with both peers and adults. Former students testified that their training at KNHC exposed them to the full range of tasks associated with operating a broadcast facility. They also testified to the personal satisfaction and growth experience in a variety of areas, such as acceptance of responsibility, ability to work with others (particularly under pressure) building self-confidence and self-esteem, and participation in a team effort and all that that entails. This testimony was corroborated by testimony from school personnel and other public witnesses familiar with the educational program.

283. All told, the unrebutted testimony establishes that the program admirably fulfilled the School Board's express goal of providing educational programs of instructional excellence wherein students are prepared for the work-world or for post-secondary training or higher education. The operation of KNHC furthered other educational and cultural goals of the School System as well. For example, the station broadcast programs that publicized activities and events within the School System to the community-at-large, thereby fostering community awareness and understanding of the School System's achievements. Further, Station KNHC contributed to achieving ethnic and cultural diversity in the School System's classrooms, since participation in the program was available through application to all high school students in the School District, and KNHC's programming was geared to responding to the ethnic and cultural needs and interests of the community.

Station KNHC's Past Performance in Meeting Community Needs

284. The School System has established that the operation of Station KNHC during the license renewal period met the needs of the community of license in two respects: (1) it provided a unique educational experience for the young people in Seattle, and (2) it broadcast substantial issue-responsive programming for the greater Seattle community.

285. The operation of a full-time over-the-air broadcast facility with a substantial listening audience, as opposed to "an electronic sandbox," converted an ordinary educational experience into a special – indeed, unique – educational opportunity. School System personnel as well as a number of public witnesses stressed the importance of a "real world" learning environment and a "live, hands-on" radio experience in developing technical skills and enabling students to develop and mature as individuals. The motivating force of reaching a significant audience – including many of the students' peers – is vital to the achievement of these results. The success of the program is evidenced not only by the testimony of the participants – both students and supervisors – but by the fact that some of the students who were enrolled in the program later obtained jobs in the communications industry, because of their prior experience at Station KNHC, or pursued advanced degrees in communications-related fields.

286. Station KNHC also served the needs of the community by broadcasting a substantial number of locally produced public affairs programs that were specifically directed to the needs and interests of the Seattle community as adduced through the station's ascertainment process (Findings, paras. 71-80).

287. Many of the station's public affairs programs during the license renewal period were produced in whole or part by the students. An excellent example of such programming, developed towards the end of the period, was "Action Line," a live, one- to three-hour public affairs broadcast on Sunday evenings. The program consisted of guest interviews and listener participation through a call-in feature. Student were involved in many aspects of the program, including selecting topics, lining up guest speakers, researching and writing summaries of the issues, and screening the telephone calls and performing other technical functions during the program. Another good example of a student-produced public affairs series was "KNHC Public Affairs," which was researched, written, and taped by the students in the radio program. This series featured discussions on a wide variety of topics of concern to the Seattle community, including crime and drug problems, environmental concerns, and public health issues. While the individual program segments were almost always less than 10 minutes in length, they provided a unique opportunity for teen perspectives on such issues.

288. KNHC's public affairs programming covered a wide range of issues of community concern identified through the station's ascertainment efforts. KNHC also broadcast programs (both locally produced and recorded) directed to its target audience – namely, teens and young adults, and minorities. Programs of special interest to youth included the locally produced "KNHC Public Affairs," "Community Calendar/KNHC Local Events," "Communique from

SCCC," and "What's Happening in the Schools," and recorded programs such as "Black Beat" and "Sounds of Listen." Programs of special interest to minorities included "Chinese Radio Program," "Mid-East International," "Spanish American Hour," "Gospel Music Program," "Black Report," "Black Beat," "Blacks Before America," "Hemispheres," "Horizontes," "Israel Magazine/Israel Press Review," and "Labor News and Views." It is also significant that KNHC broadcast public affairs programming throughout the broadcast day, and not solely during hours of low listenership.

289. With respect to news, the students of the School System produced four- to five-minute news and sports programs that were often aired hourly during the school day. The Commission has recognized that news and sports coverage is an additional indication of meritorious broadcast service. *See , e. g, Cowles Broadcasting.*, 86 FCC 2d 1006-1007.

290. The Commission also considers the broadcast of PSAs as evidence of programming that supports a renewal expectancy. *Cowles Broadcasting, Inc.*, 86 FCC 2d at 1006-1007. Station KNHC has broadcast numerous PSAs for local, regional, and national organizations, governmental agencies and departments, and colleges and universities that were responsive to a broad range of community needs and interests. During the license renewal period, Station KNHC broadcast PSAs for approximately 200 such organizations.

291. Finally, the Commission has repeatedly recognized the central role of community witness testimony in demonstrating the licensee's service to the community. *See , e. g., United Broadcasting Co.*, 100 FCC 2d 1574, 1581 (1985) (the testimony of the community witnesses paints an impressive picture of . . . responsiveness). Favorable community witness testimony is particularly convincing where, as here, there is a total absence of complaints against the station's programming or the conduct of the licensee during the license renewal period and thereafter. *Cowles Broadcasting, Inc.*, 86 FCC 2d at 1007.

292. The conclusions reached herein concerning the meritorious nature of the programming broadcast by KNHC during the renewal period is fully supported by the unrebutted testimony of a number of community witnesses. The testimony, taken as a whole, unqualifiedly establishes that the Seattle community viewed KNHC as rendering superior service, with special praise for the station's programming for teens and young adults and for minorities.

293. The School System has also demonstrated a substantial commitment to community outreach and involvement through several mechanisms, including (1) use of adult volunteers for late evening air shifts; (2) involvement of the business community in the educational process through the PIPE program; and (3) participation in the oversight of the curriculum by the station's Radio Communications Advisory Committee, which included professionals drawn from a variety of related fields.

294. KNHC's outstanding performance during the license term is not diminished by its temporary reduction in operating hours during the period of September 1982 to April 1983.[39] The findings demonstrate that the reduced hours of operation were caused by factors beyond the control of the licensee, namely, a substantial reduction in state funding. The findings also demonstrate that the reduction in hours was authorized only when other alternatives were exhausted and that throughout the entire period of the reduced operating schedule the licensee was seeking funding and the means to restore full-time operation. Moreover, as soon as possible the licensee resumed a full schedule. There is every reason to believe that future reductions will not occur. The School System received a favorable decision in its constitutional challenge to the State funding cuts with the result that State appropriations for 1983-1984 were substantially improved and are likely to remain more stable in the future. Additionally, the School Board has committed itself to the full funding of the station. These facts plus the added fact that since April 1983, KNHC has been operating consistently more than 12 hours a day provides ample evidence that the School System's commitment to full-time operation can be relied on.

Noncommercial Comparative Issue

295. For purposes of evaluating the two applicants, the Commission specified the standard noncommercial comparative issue, which seeks to determine "(a) the extent to which the proposed operation of [the applicants] will be integrated into the overall cultural and educational objectives of the respective applicants; (b) the manner in which the proposed operation of [each of the applicants will] meet the needs of the community to be served; and (c) whether other factors in the record demonstrate that one applicant will provide a superior noncommercial radio broadcast service." *Seattle Public Schools*, Memorandum Opinion and Order, FCC 86-318 at paras. 10, 60 RR 2d 1073, 1076 (1986).

296. A major issue in this proceeding, therefore, is to determine the extent of integration of each of the proposed stations into the cultural and educational objectives of the respective applicants. *Southeastern Bible College, Inc.*, 85 FCC 2d 936 (Rev. Bd. 1981), *review denied*, FCC 82-271 (released June 11, 1982). Where, as here, one of the applicants is an educational *institution* and the other an educational *organization*, the issue is the same for each party, but the required showings are different. *Seattle Public Schools*, Memorandum Opinion and Order, FCC 86M-3235 at para. 4 (released October 31, 1986); *Way of the Cross*, 58 RR 2d 455, 457, 462 (1985).

297. The School System operates an educational facility in the community of license and thus qualifies for a noncommercial license as an educational institution. *See Eligibility for Noncommercial Educational FM and TV Broadcast Station Licenses*, Notice of Inquiry, 43 Fed. Reg. 30842, 30844- 30845 (July 18, 1978) (Processing Guidelines). The obligation of an institutional applicant is to show that the operation of it station is integrated into the overall operation and educational objectives of the institution. *New York University*, 10 RR 2d 215, 218 (1967).

298. Jack Straw, on the other hand, is an educational organization. The showing required of an educational organization under the standard noncommercial comparative issue is to "demonstrate that [it has] an educational goal and [is] committed to the advancement of an educational program." *Precessing Guidelines*, 43 Fed. Reg. at 30845. The Commission has stated that educational organizations serve the public interest through educational programming, the suitability of which is measured with primary emphasis on programming categorized as "instructional" and "general educational." *Id.*

299. The second major issue in this proceeding is to determine which applicant will best meet the needs of the community to be served. *Ascertainment of Community*

Problems by Noncommercial Educational Broadcast Applicants, 58 FCC 2d 526, 526 (1976). In the commercial context, applicants meet the needs of the community through issue-responsive programming. In the noncommercial context, service to the community is interpreted more broadly, to include the educational needs of the community as well as its need for issue-responsive programming. *See Processing Guidelines, supra* ; *1976 Ascertainment Statement, supra* ; *1984 Public Broadcasting Report, supra*. With these signposts in mind, we turn to an evaluation of the relative strengths and weaknesses of the two applicants.

The Integration of the Proposed Stations in the Educational and Cultural Objectives of the Applicants

School System

300. The School System proposes to continue to operate the radio station as a hands-on vocational training program located in a classroom in one of Seattle's public high schools. The station will be integrated into the radio communications course curriculum as it was during the renewal period, providing the means for pre-production, production, and post- production training.

301. The station's operations will continue to mirror the operation of a commercial broadcast station. Students will bear substantial responsibility for the day-to-day operation of the station – both on-air and behind the scenes – enabling them to acquire and develop the technical as well as the interpersonal skills required for success in the broadcast field.

302. The station will also be used to further other goals of the School Systems, such as communicating with young people, facilitating quality integration in the classroom, and reaching, through its programming, a racially and ethically diverse audience.

303. The School System's proposals in this area are especially credible because they reflect a continuation of the station's past performance. In sum, the School System's proposal for the future will fully integrate the radio station into the School System's educational and cultural objectives as it has in the past.

Jack Straw

304. Jack Straw's proposed education program is one of "filling the gaps – of supplementing the other stations not competing with them . . ." (Finding 210). As discussed, *supra*, an organizational applicant must demonstrate they have an educational goal. Jack Straw's proposed "educational program" does not satisfy the Commission's requirements for the licensing of educational organizations to operate on reserved frequencies. *See Processing Guidelines*, 43 Fed. Reg. at 30845.

305. *Assuming. arguendo*, that Jack Straw's educational program is acceptable, Jack Straw must also establish that its proposed operation of the station will advance that program. *See e. g., Way of the Cross*, 58 RR 2d (P&F) at 460-461. In determining whether the proposed operation of the station will advance the applicant's educational program, the *Processing Guidelines* make clear that weight is to be given primarily to "instructional" and "general educational" programs. 43 Fed. Reg. at 30845.

306. "Instructional" programs are defined as "programs designed to be utilized by any level of educational institution in the regular instructional program of the institution." *Processing Guidelines*, 43 Fed. Reg. at 30845. Since organizational applicants do not, by definition, operate educational institutions, instructional programs proposed by them must be for the benefit of another institution, which should be identified in the construction permit application. *Way of the Cross*, 58 RR 2d at 460. "General educational" programs are defined as "educational program[s] for which no formal credit is given." *Processing Guidelines*, 43 Fed. Reg. at 30845.

307. Jack Straw proposes no "instructional" programming and has not in any event identified any educational institutions for whose benefit Jack Straw intends to provide such programming. Jack Straw claims a great deal of "general educational" programming, but only one hour of "general educational" programming can be credited. However well-intentioned Jack Straw's motives are or however interesting or uplifting some of its proposed programs may be, Jack Straw's programming proposal is predominantly music, which should properly be categorized as "performing arts" or "light entertainment." Although such programming is permitted and generally expected on reserved frequencies, *see* 47 CFR Section 73.503(b) (1986), it is to be accompanied by a core of instructional and general educational programming, which is totally lacking here.

308. In summary, the School System has made the requisite showing that its continued operation of KNHC will be fully integrated into the School System's educational and cultural objectives, even without regard to the renewal expectancy. Jack Straw has not demonstrated it has an educational goal or that its proposal advances an education program, which is the threshold requirement for educational organizations seeking a reserved frequency. As noted, *supra*, Jack Straw has proposed no "instructional" programming and only one hour (properly classified) of "general educational" programming. Jack Straw has failed to establish the requisite integration of the operation of the proposed station into its educational and cultural objectives. On this issue, therefore, the School System receives a substantial preference.

The Extent to Which the Operation of the Proposed Stations Will Meet the Needs of the Community

The School System

309. The School System proposes to continue to operate Station KNHC to meet community needs, as it has in the past, by providing an exceptional educational opportunity to students in the Seattle Public Schools and by broadcasting nonentertainment programming that is responsive to the needs and interests of the greater Seattle community.

310. The testimony of the students enrolled in the program as of the date of the hearing is overwhelming evidence of the uniqueness of the program, and it is clear that the operation of a "real" radio station, as opposed to an "electronic sandbox," is the key to that uniqueness. Students and teachers, both within the School System and without, attested to the need for hands-on experience to gain employment in broadcasting, and the operation of KNHC admirably meets this need.

311. The greater Seattle community will also be well-served by the School System's continued operation of KNHC. The record in this proceeding establishes that, throughout the renewal period and beyond, the School System has diligently ascertained community needs and

interests, using proper ascertainment methods. The station has consistently aired issue-responsive programming, much of it locally produced by students. In light of this substantial record of performance, confirmed by the unrebutted testimony of public witnesses, the School System's promise to continue to ascertain needs and interests and to air programs responsive thereto is entitled to great weight. *Pillar of Fire*, 99 FCC 2d 1256 (Rev. Bd. 1984).

Jack Straw

312. Jack Straw, on the other hand, has failed to establish that its proposal will meet the needs of the residents of Seattle for issue-responsive programming. Jack Straw's deficiencies in this area are, in part, a by- product of its inadequate ascertainment efforts. Jack Straw did not conduct a survey of community leaders or attend the regularly scheduled ascertainment meetings of area broadcasters to which it would have been invited when KRAB was on the air. Nor did Jack Straw submit any evidence as to the needs of the greater Seattle area; indeed, when questioned at the hearing, Jack Straw's witnesses were unable to identify any of the top ten issues of concern to the residents of Seattle.

313. Moreover, when the Jack Straw witnesses elaborated on their "ascertainment" efforts under questioning by the Mass Media Bureau and the Presiding Judge, it became clear that these witnesses failed to understand that eliciting programming preferences (*i. e.*, for fusion jazz or East Texas country music) is not the same as ascertaining issues of concern to the community (*ie.*, the economy, crime, health, etc.) through interviews with community leaders or surveys of the general public. The record further reflects that Jack Straw's "ascertainment" methods – such as listener surveys and reviews of weekly periodicals describing radio programming in the area – were intended to and did in fact produce the former – *i. e.*, the identification of programming concepts that might be of interest to small segments of the population.

314. In addition, Jack Straw's proposed programming does not appear to be issue-responsive, as the Commission has used the term, principally because Jack Straw's programming seems to be largely unrelated to issues that might currently be of concern to the residents of Seattle. Most of the programming proposed by Jack Straw in the "public affairs" category is recorded, and much of it is already in Jack Straw's archives. While the use of prerecorded programs to address community needs is certainly acceptable, the applicant has the burden of demonstrating that such programs address a *current* need. *See Renewals of Certain D. C. Broadcasting Stations*, 77 FCC 2d 899, 906, *recon. denied*, FCC 80-613 (released Oct. 21, 1980). Jack Straw has not made such a showing in this proceeding.

315. Accordingly, Jack Straw has failed to meet its burden of demonstrating that its proposal will meet the needs of the community, as that phrase is traditionally understood by the Commission. Here, as above, the School System has made the requisite showing, again without regard to the renewal expectancy. On the basis of the record, therefore, the School System receives a substantial preference on this aspect of the comparative issue.

316. Each of the applicants claim, in addition to the matters discussed, *above*, that other factors indicate it will provide a superior noncommercial service. A determination must be made as to the weight to be given these factors.

Other Factors Indicating Superior Broadcast Service

The School System

317. The School System established that other relevant factors indicated it will continue to provide a superior noncommercial educational service. These factors include community outreach and involvement which will continue to take three forms: using volunteers for the late evening air shifts; participating in the PIPE program with Seattle's major broadcasters and other business entities; and relying on the experience and advice of the members of KNHC'S Radio Communications Advisory Board in refining the educational program and the operation of the radio station itself. Also relevant is School Board support for the operation of KNHC as an integral component of the School System's radio communication program. These factors enhance the School System's decisive comparative advantage.

Jack Straw

318. Under the "other factors" aspect of the comparative issue, Jack Straw has submitted evidence with respect to comparative coverage to be provided by the applicants. This evidence indicates that Jack Straw will provide a first and second noncommercial educational service to 209 and 484 square miles, with populations of 11,778 and 81,194, respectively. The School System will provide no first service and will provide a second noncommercial educational service to 97 square miles with a population of 15,378.

319. However, Jack Straw's comparative coverage advantage can not be credited since, as discussed in findings 225 and 226, it has not demonstrated it can implement the technical proposal contained in its application. The issue is not, as urged by Jack Straw and the Bureau, whether Jack Straw can provide a reasonable assurance that the Cougar Mountain site is available. Thus, the fact that the site may be available for Jack Straw's use is beside the point. What is at issue is whether Jack Straw can meet the 200 uW/cm2 expected radiation standard for King County as a whole as well as the more stringent 110 uW/cm2 standard applicable to its Cougar Mountain site by utilizing the tower it proposes and the antenna system it proposes. Potential modification in its antenna system as well as the possible availability and use of a 300 foot tower proposal are irrelevant. These alternative proposals cannot be considered absent the filing and grant of a petition for leave to amend. Jack Straw has chosen not to amend its application. Having based its coverage showing on the proposal in its application, Jack Straw's obligation is to show that that proposal can be implemented. It has failed to make such a showing and its comparative coverage claims cannot be credited.

320. In any event, Jack Straw's coverage advantage would not overcome the School System's renewal expectancy. As noted, *supra*, renewal expectancy in a non commercial educational context is a novel question.[40] Thus, the weighing of comparative preferences against a renewal expectancy is uncharted territory. To complicate matters, while comparative coverage has been deemed significant in cases involving new commercial applicants, the Presiding Judge is not aware of any non-commercial applicant case where comparative coverage was a factor. However, *New York University*, 10 RR 2d 215 (1967), the seminal case on competing applicants for reserved educational channels, sheds light on the relative importance of comparative coverage in a non-commercial context. in *New York University*, the Commission, after previously des-

ignating the standard Section 307(b) and comparative issues, reconsidered the scope of the issues on its own motion. The Commission stated that, had the proceeding involved commercial rather than noncommercial applicants, the case would have presented, on it face, the standard 307(b) issue because the two applicants were located in different cities within the same metropolitan area. The Commission concluded, however, that

> We are not persuaded that our traditional areas and populations, and other available services criteria are appropriate in this instance. . . . *Id.* at 216.

The Commission ultimately specified an issue as to "available services" but specifically directed the Presiding Judge to give whatever weight he deemed appropriate to that issue. *Id.* at 217. As is apparent from the Review Board's subsequent review of the Presiding Judge's Initial Decision, the issue did not affect the outcome of the comparative evaluation in any event. *New York University*, 19 FCC 2d 358, 362 (Rev. Bd. 1969). Following the Commission's decision on reconsideration, one of the applicants petitioned the Review Board for enlargement and modification of the issues. *New York University*, 10 FCC 2d 53 (Rev. Bd. 1967). Among other things, the petitioner requested that the noncommercial comparative issue be designated as a contingent issue, to be considered only if the Section 307(b) considerations were not controlling. The Board refused, noting that "[w]e do not believe that this fundamental issue [*i. e.*, the noncommercial comparative issue] should be contingent on the outcome of the areas and populations issue." *Id.* at 56. From all of the above, it seems clear that unlike commercial applicant cases, comparative coverage is of only minor import in non-cmmercial educational cases. Thus, if this case was decided on the non-comparative issue alone without regard to renewal expectancy, the School System's decisive preference on the fundamental criteria, *i. e.*, integration into overall cultural and educational objectives and addressing the needs of the community far outweighs Jack Straw's claimed comparative coverage advantage. It thus follows where the School System has the added advantage of a renewal expectancy that grant of the School System's renewal application is mandated.

321. Moreover, the Commission has recently ruled that in comparative renewal cases involving applicants for different communities[41] a 307(b) issue "will be contingent on whether the incumbent licensee demonstrates it has earned a renewal expectancy." *Pillar Of Fire*, 2 FCC Rcd. 519 (1987). The Commission reasoned, notwithstanding the importance of the allocation scheme delineated in Section 307(b) of the Act, that its action was justified by the public interest need to maintain stability in the allocation of broadcast channels and to avoid disruption to existing services. 2 FCC Rcd. at 521. The same reasoning would also mandate that Jack Straw's comparative coverage advantage would not justify replacing the School System, an incumbent licensee who has earned a renewal expectancy. This is particularly so since (a) comparative coverage, one of many comparative factors, is of far less importance that compliance with the statutorily mandated 307(b) even in commercial renewal cases; and (b) comparative coverage is only of minor import in noncommercial educational cases.

The Share Time Issue

322. The Hearing Designation Order requires a determination whether a share time arrangement between the School System and Jack Straw would better serve the public interest than would a grant of either the School System's renewal application or Jack Straw's full-time application. It is concluded that the public interest would be better served by a grant of the School System's renewal application.

323. As detailed, *supra*, the record persuasively demonstrates that the School System has provided exceptional service to Seattle and is entitled to the greatest credit in terms of a renewal expectancy. Under the circumstances, requiring a share time arrangement would do great violence to the policy, embodied in the renewal expectancy, of rewarding meritorious past performance. Imposing a share time arrangement is also undesirable in light of the School System's decisive preference on the non comparative issues. The School System has made the requisite showing that its continued operation of KNHC will be fully integrated into the School System's educational and cultural objectives. By contrast, Jack Straw has not demonstrated it has an educational goal or that its proposal advances an educational program, which is the threshold requirement for educational organizations seeking a reserved frequency. In addition, the record establishes that the School System will continue, as it has in the past, to meet community needs. Jack Straw, on the other hand, has failed to establish that its proposal will meet the needs of the residents of Seattle for issue-responsive programming. Jack Straw's failure to justify its use of a reserved educational frequency on a full-time or shared basis, further militates against the imposition of a share time arrangement.

324. Finally, the record establishes that the School System needs its current hours of operation in order to meet the educational objectives of its radio communications program. These objectives include providing vocational training in a setting that mirrors a commercial broadcast station (*i. e.*, a full-time "real" radio station) ensuring that all students who want to appear on the air have the opportunity to do so, and providing the motivation – the knowledge that the station is reaching significant audience, including many of the students' peers – for students to enter and remain in the program, which is an intangible but essential part of the educational process.

325. The School System has also demonstrated that its current hours of operation are essential to enable it continue to meet the needs and interests of its listening audience as effectively as it has in the past. The station's target audience, both for its entertainment and its nonentertainment programming, is teens and young adults, who, for the most part, are in school during school hours on school days. The radio station has consistently scheduled its lengthy student-produced public affairs programs during after- school hour (*i. e.*, Sunday afternoons during the license renewal period and, more recently, week-night evenings) when young people are able to listen. Moreover, community leaders who want to reach teens and young adults have come to KNHC because they know their target audience is listening. Loss of the after-school and weekend hours would jeopardize the ability of the station to reach these young people.

326. The School System's past performance demonstrates unequivocally that the School System is a licensee committed to providing a superior noncommercial educational broadcast service in and for the Seattle community.

Under these circumstances, to have its hours of operation reduced would be inconsistent with the policies underlying the share time rule, inconsistent with the policies underlying renewal expectancies, and, most importantly, inconsistent with the public interest. The School System's application for renewal of license will be granted.[42]

Accordingly, IT IS ORDERED, That the "Motion To Accept Additional Pleading" filed May 8, 1987 by Jack Straw Memorial Foundation IS GRANTED and the additional pleading IS ACCEPTED.

IT IS FURTHER ORDERED, That the "Motion To Accept Additional Pleading" filed May 21, 1988 by Seattle Public Schools IS GRANTED and the additional pleading IS ACCEPTED.

IT IS FURTHER ORDERED, That the application of Seattle Public Schools for renewal of the license for Station KNHC IS GRANTED and the application of Jack Straw Memorial Foundation to operate full-time or on a shared time basis on the frequency occupied by Station KNHC IS DENIED.[43]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The ruling was in response to Jack Straw's renewed request that comparative coverage evidence be considered (Tr. 155). An earlier request by Jack Straw, prior to the decision on reconsideration specifying the standard noncommercial comparative issues was rejected. *See Order*, FCC 86M-2001, released June 19, 1986.

[2] The School System submitted the declarations of 56 witnesses, including the written direct testimony of Mr. Neilson, Mr. Hodgson, Mr. Vassar, and Mr. Wang. The remaining 52 declarations were submitted on behalf of educators, past and present students of the radio communications program, parents, community leaders, and persons who participated in KNHC's locally produced public affairs programming.

[3] The Bureau's findings are limited to the misrepresentation issue against Jack Straw, comparative coverage, and the School System's entitlement to a renewal expectancy.

[4] On April 6, 1987, Jack Straw filed a "Memorandum In Support Of Coverage Evidence." On April 20, 1987, the Bureau filed Comments; the School System filed an Opposition. On May 8, 1987, Jack Straw filed a "Motion To Accept Additional Pleading," which is unopposed, and will be granted. Likewise, the School System has shown good cause for grant of its "Motion To Accept Additional Pleading" filed May 21, 1987 and its response to Jack Straw's further pleading will also be accepted.

[5] As discussed, *infra*, the station has since sought and obtained an increase in power from 3000 watts to 10,000 watts.

[6] During the license renewal period, 66 students from Nathan Hale High School served as on-air announcers. (*See* Neilson, SPS Ex. 1, Attachment A.) During this same period, there were 30 adult staff members and other volunteers on-air, including 7 students who had graduated during the renewal period and continued to appear on-air as "adult" volunteers and 8 students from Seattle Central Community College. (*Id.*)

[7] *See* note 6 *supra* for the number of adult volunteers (including adult staff members) who appeared on-air during the license renewal period.

[8] The study in fact continued through August 1986, the end of the last complete school year before the exchange date in this case. The programs broadcast in the post-renewal period are discussed, *infra*.

[9] During the post-renewal period, 63 students from Nathan Hale and Cleveland served as on-air announcers. (*See* , Neilson, SPS Ex. 1, Attachment A) Twenty-one of these students had appeared on-air during the renewal period as well. There were 23 adult staff members and other volunteers on-air during the post-renewal period, including 9 students who graduated from Hale and continued to appear on-air as "adult" volunteers. Thirteen of the 23 adults had appeared on-air during the renewal period as well. (*Id.*)

[10] A Level One announcer is required to have taken one-quarter of an "Introduction to Radio and Television" course (*i. e.*, one-half of the semester- long course). The student announcer's Level One duties consist of working on his or her audition tape (Neilson, SPS Ex. 1, para. 41). After the student completes a satisfactory audition tape, he or she is moved to Level Two. Duties at that level include board operation -- that is, operation of the console without on-air announcing. To motivate students to complete their Level Two requirements, a student may remain at Level Two without advancing for only eight weeks, after which time the student is moved back to Level One. Level Two requirements include successfully completing five broadcast-quality PSAs, which are then aired on KNHC, and observing a Level Four announcer for one hour on each of three separate days. (*Id.*) Level Three announcers are eligible for all supervised air shifts and are responsible for the production of station announcements. After a Level Three announcer has demonstrated a record of dependability in following station policy and has developed sufficient production skills, the student can be moved up to Level Four if he or she is recommended to the General Manager by the Station Manager or the Program Director. (*Id.*) Level Four announcers are eligible to be training announcers for the Level Three announcers. (*Id.*)

[11] *See* note *supra* for the number of adult volunteers (including adult staff members) who appeared on-air during the post-renewal period.

[12] Prior to 1984, the Board's membership was self-perpetuating. Following litigation in which the Washington State Attorney General's Office intervened, one third of the Board is to be elected by the members of Jack Straw, with the criteria for membership being a minimum financial contribution or a minimum number of hours of volunteer time devoted to the organization (Margason, Tr. 1562; Sinclair, Tr. 2055).

[13] The same litigation referred to in the preceding footnote led to a limitation on the use of the KRAB sale proceeds for the purposes specified in the Jack Straw articles of incorporation -- namely, for the purpose of establishing and operating one or more radio stations for educational and cultural purposes (SPS Ex. 71; Margason, Tr. 1573-1574; *See* Margason, JS Ex. 1, Attachment 1).

[14] Ms. Sinclair testified that she believed the short wave news program qualified as locally produced because a Jack Straw staff member was responsible for selecting and taping the various news programs off the short wave radio (Sinclair, Tr. 1887-1888).

[15] In comparing the first and second noncommercial educational FM services of the respective applicants, the exhibit took into consideration "shadowing", employing the "Longley-Rice" contour calculation methodology (Jt. Ex. 1).

[16] The Bureau urges that for comparative purposes KNHC's 3kw facility should be used because that reflected the School System's authorized power as of the time the competing application of Jack Straw was filed. However as pointed out in the School System's Reply Findings (Pages 36-37), Jack Straw's application, originally tendered in January 1984 was not accepted for filing. A new application was submitted *nunc pro tunc* on May 22, 1984, and accepted for filing on June 8, 1984. Official notice taken of FCC Public Notice, Broadcast Applications, Report No. 13111 at 6, released June 8, 1984. The cut-off date was December 6, 1984. Since the School System's application for a power increase to 10kw was filed in advance of that date - July 19, 1984, the 10kw facility is appropriate for comparative purposes.

[17] The letter from Bryan Glynn, Manager of King County Building & Land Division dated March 24, 1987 (Mem., Att. 1, Ex. B, at 1) states that (1) when Jack Straw's transmission facilities were proposed to the FCC in May, 1984, it did not comply with the existing King County land use restrictions; and (2) no conclusion can be made whether a variance might be granted for a 145 foot tower.

[18] Jack Straw appears to acknowledge that the antenna design proposed in BPED-840103AR cannot meet the 200uW/cm2 standard. *See* Memorandum, at 9, *citing* Attachment 2, at 2.

[19] See *Conditional Use Permit Appeal Of KRAB - FM, Inc. for KONG TV, Inc.*, Office of the Zoning and Subdivision Examiner, King County, Washington, Building and Land Development File No. 84-48-C (April 8, 1985). (Opposition of School System to Jack Straw's Memorandum, Attachment A.

[20] The engineering statement argues it would be possible for three existing FM stations, KONG-TV, and Jack Straw to operate from the Sunbelt site and to comply with either a 110uW/cm2 or a 200uW/cm2 standard by using a common panel antenna (Mem., Att. 2 at 2). However, Jack Straw has not sought to amend its application to adopt this alternative. Therefore, such proposal cannot now be considered.

[21] Jack Straw has been on notice since April 1985 of the Hearing Examiner's decision requiring it to meet the 110uW/cm2 standard. It has chosen, however, not to seek leave to amend its proposal to accommodate this requirement.

[22] As reflected in Neilson, SPS Exhibit 1, Attachment D, this schedule represents the regularly scheduled hours of operation; the School System frequently operates the Station beyond these hours.

[23] The 1983 proposal was attached to Jack Straw's share-time exhibit and incorporated by reference into it (Margason, Tr. 1624-1625).

[24] The Presiding Judge has adopted the Joint Findings submitted by the parties.

[25] Sunbelt subsequently formed a subsidiary called KRAB, Inc. to hold the KRAB license (*See* Tr. 2300-2301). For the sake of simplicity, all references to Jack Straw's assignee are to Sunbelt.

[26] At the time the Purchase Agreement was negotiated, the Cougar Mountain location was occupied by other communications users, including Stations KMPS and KZOK (Tr. 2302-2303).

[27] Jack Straw's counsel characterized this retained interest as a "right to co-locate the Foundation's *new* FM facilities at KRAB's present site" (JS Ex. 16B at p. 11 (Opposition to Petition to Deny, para. 19)).

[28] The KONG-TV plan to construct a new 300-foot tower was not proposed until after the April, 1984 closing on the assignment of Station KRAB (Tr. 2462- 2463).

[29] A separate tower was required because the existing Sunbelt tower could not accommodate the special antenna which Jack Straw had proposed in order to achieve a directionalized pattern (Tr. 2459-2461).

[30] Following the hearing, the correspondence with Sunbelt concerning this matter was discovered and provided to the other parties. A copy of that correspondence has been received and identified as JS Ex. 45.

[31] Jack Straw's claim to a renewal expectancy is without basis. Jack Straw bases this contention on the grounds that it was a noncommercial licensee licensed to serve Seattle during the entire proceeding license term, that it had timely filed a license renewal application, and that it announced its intention to continue its operations on the noncommercial portions of the FM band. Jack Straw has overlooked the significant facts that while it filed a renewal application, it also filed an application for transfer of control and that while Jack Straw was formerly a licensee in Seattle, it is not now a licensee. Furthermore, since the School System is and has been the licensee of Channel 208 since 1971, only the School System can be considered for a renewal expectancy. Since Jack Straw is not entitled to a renewal expectancy, its past programming would be relevant only if shown to be unusually good or bad. Jack Straw has failed to meet that standard. *See Memorandum Opinion and Order*, FCC 86M-3235, released October 31, 1986. It therefore can not rely on its past record.

[32] To be sure, the 1967 Act represented an important step in the development of public broadcasting. Prior to 1967, the principal use of the noncommercial reserved frequencies was for educational institutions to provide training in the operation of a broadcast station and/or to provide instructional programming. The 1967 Act -- which, among other things, created the Corporation for Public Broadcasting -- gave Congressional blessing to educational organizations' using reserved frequencies to provide programming that was responsive to the educational and cultural needs of the public. While the 1967 Act reflected Congressional acceptance of an expansion of uses of the reserved frequencies, it did not, as Jack Straw argued reflect a Congressional determination that the preexisting uses of the channels were inappropriate or illegitimate, or that the standards governing noncommercial educational broadcasters had changed or should be changed. Had Congress intended to change the ground rules for noncommercial licensees or to disenfranchise noncommercial educational institutions which had devoted substantial resources to the training of students and the airing of instructional programming, it would not have done so in such a subtle way.

[33] Jack Straw also argues that the changed role of noncommercial licensees "was confirmed in the 1981 Communications Act Amendments." (JS PC, para. 27). In fact, the 1981 Act was an appropriations bill for the Corporation for Public Broadcasting. There is no language in the amendment or its legislative history indicating that Congress intended to use this vehicle to rewrite the obligations of noncommercial educational licensees.

[34] *Ascertainment of Community Problems*, 58 FCC 2d 526 (1976).

[35] Moreover, the Commission stressed that it was not seeking to impose a defined "role" upon public broadcasting by adopting ascertainment requirements. *See* 58 FCC 2d at 529.

[36] *Revision of Program Policies and Reporting Requirements Related To Public Broadcast Licensees*, 98 FCC 2d 746 (1984).

[37] Jack Straw's citation (JS PC para. 27) of the share-time rule, Section 73.561(b), and the related Report and Order, *Noncommercial Educational FM Broadcast Stations*, 70 FCC 2d 972 (1979), adds nothing to its argument. The Commission is of

course concerned that educational channels be used to meet the Congressional objectives. It does not follow that those objectives are captured in Jack Straw's formulation.

[38] Issue 4(a) and (c) are derived from *New York University, supra*. Issue 4(b) and the words "cultural and" in issue 4(a) are derived from *Pacific Foundation, supra*. In *Pacifica* the Board stated the changes were appropriate since unlike the facts in New York University, neither applicant was an educational institution.

[39] During this seven month period the School System averaged 70 hours per week (SPS Ex. 1, Att. D) well above the 36 hours per week minimum specified in Section 73.561(a) of the Rules.

[40] The Review Board recently noted that the question is "troubling" and could benefit from further Commission guidance. KQ ED, Inc., FCC 88R-25, released May 2, 1988, note 21. However, unlike KQED where the question could be avoided, it must be squarely faced here.

[41] Jack Straw's claim that its provision of service to white and grey areas should be treated as a 307(b) matter rather than as one of the "other factors" under the standard comparative issue is without merit. No 307(b) issue has been sought or designated. Further, a 307(b) issue is appropriate only where the applicants seek to serve different communities.

[42] The record also demonstrates that a share time arrangement would disserve the public interest for another reason. It is clear that the School System and Jack Straw are philosophically far apart, and their aims and objectives are quite divergent. To require them to come together in a mandatory time sharing arrangement would not be workable.

[43] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-232

In the Matter of

Amendment of Section 73.202(b),	RM-5694
Table of Allotments,	RM-6066
FM Broadcast Stations.	
(Bethalto and Collinsville, Illinois)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 19, 1988; Released: May 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd. 3911 (1987), proposing to allot Channel 238A to Bethalto, Illinois, as a first FM service at the request of Bethalto Broadcasting (petitioner). Petitioner did not submit comments in support of the Bethalto allotment, but instead, filed a counterproposal seeking to allot Channel 238A to Collinsville, Illinois as a first FM service.[2] Petitioner submitted supplemental comments. [3]

2. In its supplemental comments, petitioner states that it has recently become aware of a daytime-only AM station that is seeking authority for nighttime operation at Edwardsville, Illinois. The station's studio is located in Collinsville. According to petitioner, the Edwardsville station would provide substantially more service to Collinsville than is currently provided to Bethalto. Petitioner advises the Commission that based on possible future service to Collinsville, it wishes to withdraw the Collinsville counterproposal in order to maintain a fair, efficient and equitable distribution of service to the communities. Petitioner also states that it is now interested in applying for use of Channel 238A at Bethalto, and points out that no other party has commented in the proceeding.

3. Based on the petitioner's withdrawal of the Collinsville counterproposal and expression of interest in applying for authority to operate at Bethalto, we believe that the public interest would be served by adopting the petitioners original request and allotting Channel 238A to Bethalto, Illinois, as its first FM channel. The allotment can be made in compliance with the minimum distance separation requirements with a site restriction of 8 kilometers (5 miles) northeast of the city to avoid short spacing to Station KJEZ(FM), Poplar Bluff, Missouri, and to Station KWNR(FM), Mexico, Missouri.[4]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 11, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Bethalto, Illinois	238A

5. The window period for filing applications on Channel 238A at Bethalto, Illinois will open on **July 12, 1988,** and close on **August 11, 1988.**

6. IT IS FURTHER ORDERED, That the counterproposal of Bethalto Broadcasting, proposing to allot Channel 238A to Collinsville, Illinois (RM-6066), IS HEREBY DISMISSED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communityof Collinsville has been added to the caption.

[2] *Public Notice* of the counterproposal was given on September 4, 1987, Report 1675.

[3] Petitioner's comments of January 12, 1988, have been accepted for consideration herein since they provide the Commission with information which is of benefit in resolving the issues of this proceeding.

[4] Coordinates for Channel 238A at the restricted site are 38-58-34 and 90-00-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-298

In the Matter of

Amendment of Section 73.202(b),	RM-5754
Table of Allotments,	
FM Broadcast Stations.	
(Garden City, Indiana)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 19, 1988; Released: May 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making* herein, 2 FCC Rcd 4732 (1987), issued in response to a request filed by Martin L. Hensley (petitioner) proposing the allotment of Channel 275A to Garden City, Indiana, as that community's first local FM service. Supporting comments were filed by petitioner reiterating his intention to apply for the channel, if allotted. Additionally, comments of various citizens of Garden City were received in support of petitioner's proposal. No opposition comments were filed.

2. As indicated in the *Notice*, Channel 275A can be allotted to Garden City, Indiana, in conformity with the minimum distance separation requirements contained in Section 73.207(b) of the Commission's Rules, provided the transmitter site therefor is located at least 7.8 kilometers (4.9 miles) west[1] of the city. Such restriction is required to negate a short-spacing to Station WOVR-FM (Channel 276A), Versailles, Indiana.

3. In view of the above, we believe the public interest would be served by the instant proposal since it could provide a first local FM service to Garden City. Therefore, according to the authority set forth in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 11, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Garden City, Indiana, as reflected below:

City	Channel No.
Garden City, Indiana	275A

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications on Channel 275A at Garden City, Indiana, will open on **July 12, 1988,** and close on **August 11, 1988.**

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process, should be directed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Reference coordinates of the restricted site are North Latitude 39-11-11 and West Longitude 86-01-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-588

In the Matter of

Amendment of Section 73.202(b), RM-6107
Table of Allotments,
FM Broadcast Stations.
(University Park, Pennsylvania)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 25, 1988; Released: May 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of State College Communications Corp. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 65 (1988), proposing the substitution of Channel 246A for Channel 244A at University Park, Pennsylvania, and the modification of its license for Station WQWK(FM) to specify the new channel. Petitioner seeks the 0ubstitution of channels so that it may co-locate the transmitter of Station WQWK(FM) at the nighttime antenna site of co-owned Station WRSC(AM). Petitioner filed comments supporting the substitution of channels and modification of its license accordingly. No other comments were received.

2. Channel 246A can be allotted to University Park in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.4 kilometers (4.6 miles) west which will accommodate petitioner's desired site.[1] Canadian concurrence has been received since University Park is located within 320 kilometers (200 miles) of the U.S.- Canadian border.

3. We believe the public interest would be served by substituting Channel 246A for Channel 244A at University Park since it could permit Station WQWK(FM) to relocate its transmitter to better serve the community. As proposed, we shall also modify petitioner's license to specify operation on the newly allotted channel. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 11, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
University Park, Pennsylvania	246A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of State College Communications Corp. for Station WQWK(FM), State College, Pennsylvania, IS MODIFIED, effective **July 11, 1988,** to specify operation on Channel 246A, in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-48-32 and West Longitude 77-56-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-587

In the Matter of

Amendment of Section 73.202(b), RM-6111
Table of Allotments,
FM Broadcast Stations.
(Byng, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 25, 1988; Released: May 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Don Carmichael (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 67 (1988), proposing the allocation of Channel 261C2 to Byng, Oklahoma, as the community's first local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 261C2 to Byng, Oklahoma, since an interest has been expressed in providing the community with its first local FM service. Channel 261C2 can be allocated to Byng in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 kilometers (3.4 miles) west to avoid a short-spacing to Station KTCS-FM, Fort Smith, Arkansas.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 11, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Byng, Oklahoma	261C2

4. The window period for filing applications will open on **July 12, 1988,** and close on **August 11, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-52-13 and West Longitude 96-43-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-379

In the Matter of

Amendment of Section 73.202(b), RM-5870
Table of Allotments,
FM Broadcast Stations.
(Crystal Falls, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 25, 1988; Released: May 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5703 (1987), issued in response to a petition filed by Munising Radio, Inc. (petitioner), proposing the substitution of FM Channel 264C1 for Channel 264C at Crystal Falls, Michigan.[1] Petitioner reaffirmed its interest in applying for the new channel at Crystal Falls. No other comments were received.

2. Petitioner indicated in its petition a desire to operate broadcast station in Crystal Falls but was unable to secure a suitable tower site, as the area designated for a tower is very small and within that area are several state forests. According to petitioner, because of the natural scenic beauty of the area, local officials in the surrounding townships have indicated that zoning for a tower of 300 meters in height would present serious problems, even if a site could be found. Therefore, petitioner requested the substitution of a lower class of channel which would reduce the minimum tower height for the station.

3. After consideration of the above information, we find it is in the public interest to substitute FM Channel 264C1 for Channel 264C at Crystal Falls, Michigan. Channel 264C1 can be allocated to Crystal Falls, Michigan, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided there is a site restriction approximately 1 kilometer (0.62 miles) southwest of the community.[2] The site restriction will prevent a conflict with Station WNMU-FM, Channel 211C1, Marquette, Michigan. Concurrence of the Canadian government has been obtained for this allocation since Crystal Falls is located within 320 kilometers (200 miles) of the common U.S.-Canadian border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 11, 1988;** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below:

Community	Channel No.
Crystal Falls, Michigan	264C1

5. The window period for filing applications will open on **July 12, 1988,** and close on **August 11, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Channel 264C was allocated to Crystal Falls, Michigan, in *Report and* Order in Docket 83-949, effective October 12, 1984.

[2] The site coordinates used for Channel 264C1 are 46-04-58 and 88-20-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-335

In the Matter of

Amendment of Section 73.202(b),	RM-5634
Table of Allotments,	RM-5897
FM Broadcast Stations.	
(Steelville and Hermann, Missouri)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 25, 1988; Released: May 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5634 (1987), issued in response to two separate petitions for rule making. Randal Wachter, to be known as Twenty-One Sound Communications, Inc. (Twenty-One) requests the substitution of FM Channel 227C2 for Channel 244A at Steelville, Missouri, and modification of its license for Station KNSX-FM, to specify operation on Channel 227C2. Kenneth W. Kuenzie proposed the allotment of FM Channel 227A to Hermann, Missouri. In response to the *Notice*, Kenneth W. Kuenzie filed comments withdrawing his interest in the proposal for Hermann, Missouri. Twenty-One filed comments reaffirming its interest in Channel 227C2 at Steelville. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 227C2 for Channel 244A at Steelville, Missouri, since it could provide the community with its first wide coverage area FM service. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at the current site of Station KNSX-FM.[1] In addition, we have authorized in paragraph 4, a modification of the petitioner's license for Station KNSX-FM, Steelville, Missouri, to specify operation on Channel 227C2, in accordance with Section 1.420(g) of the Commission's Rules, since no other expressions of interest have been received. *See Modification of FM Broadcast Station Licenses*, 98 FCC 2d 916 (1984).

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 11, 1988**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Steelville, Missouri	227C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KNSX-FM, Steelville, Missouri, IS MODIFIED to specify operation on Channel 227C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 227C2 at Steelville are 37-55-40 and 91-26-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-355

In the Matter of

Amendment of Section 73.202(b), RM-5860
Table of Allotments,
FM Broadcast Stations.
(Macomb, Illinois)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 19, 1988; Released: May 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5596 (1987), issued in response to the petition of McDonough Broadcasting, Inc. (petitioner), licensee of Station WJEQ(FM), Macomb, Illinois, proposing the substitution of Channel 274B1 for Channel 276A at Macomb, and modification of its Class A license, accordingly. In response to the *Notice*, petitioner filed comments restating its interest in Channel 274B1.

2. We believe that the public interest would be served by substituting Channel 274B1 for Channel 276A at Macomb, Illinois, in order to provide an increase in coverage by Station WJEQ(FM). The substitution can be made in compliance with the Commission's minimum distance separation requirements.[1] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WJEQ(FM) to specify operation on Channel 274B1.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 11, 1988**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Macomb, Illinois	261A, 274B1

4. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of McDonough Broadcasting, Inc., for Station WJEQ(FM), Channel 276A, Macomb, Illinois, IS MODIFIED to specify operation on Channel 274B1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 274B1 at Macomb, utilizing the transmitter site for Channel 276A, are 40-29-00 and 90-38-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-231

In the Matter of

Amendment of Section 73.202(b), RM-5705
Table of Allotments,
FM Broadcast Stations.
(La Salle, Illinois)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 19, 1988; Released: May 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd. 3939 (1987), proposing to substitute Channel 257B1 for Channel 257A at La Salle, Illinois, at the request of La Salle County Broadcasting, Inc. (petitioner), licensee of Station WAJK-FM, Channel 257A, La Salle. In addition, the *Notice* proposed to modify the station license to specify Channel 257B1. Comments in support of the proposal were filed by the petitioner.

2. After consideration of the proposal, we conclude that the public interest would be served by the channel substitution at La Salle, in order to provide an increase in coverage by Station WAJK-FM. The substitution can be made in compliance with the minimum distance separation requirements. As stated in the *Notice* the allotment of Channel 257B1 to La Salle will require a site restriction of at least 10.8 kilometers (6.7 miles) northwest of the city to avoid short spacing to Station WDUK(FM), Havana, Illinois, and Station WUSN(FM), Chicago, Illinois.[1] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are herein modifying the license for Station WAJK(FM) to specify operation on Channel 257B1.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 11, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
La Salle, Illinois	257B1

4. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of La Salle County Broadcasting, Inc., Station WAJK-FM, La Salle, Illinois, IS MODIFIED to specify operation on Channel 257B1 in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for Channel 257B1 at the restricted site are 41-22-29 and 89-13-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-218

In the Matter of

Amendment of Section 73.202(b), RM-6232
Table of Allotments,
FM Broadcast Stations.
(Statesboro, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 19, 1988; Released: May 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers a petition for rule making filed by Radio Statesboro, Inc. (petitioner), licensee of Station WMCD(FM), Statesboro, Georgia, which seeks to substitute Channel 261C2 for Channel 261A, and to modify its Class A license to specify operation on the Class C2 channel.

2. Petitioner submitted information in support of the proposal and stated that an upgrade of its facilities would permit Station WMCD to substantially improve its service to the Statesboro area. Petitioner proposes to upgrade at its present Class A transmitter site (coordinates 32-27-21 and 81-46-29).

3. In accordance with our established policy, we shall propose to substitute Channel 261C2 for Channel 261A at Statesboro, Georgia, and modify the license accordingly. Pursuant to Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest for Channel 261C2 at Statesboro.

4. Comments are invited on the proposal to amend the FM Table of Allotments (Section 73.202(b) of the Rules) with respect to the community listed below:

	Channel No.	
City	Present	Proposed
Statesboro, Georgia	261A, 275A	261C2, 275A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 18, 1988,** and reply comments on or before **August 2, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Edward W. Hummers, Jr.
Fletcher, Heald and Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certificationthat Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-215

In the Matter of

Amendment of Section 73.202(b), RM-6176
Table of Allotments,
FM Broadcast Stations.
(Campbellsville, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 18, 1988; Released: May 26, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the petition for rule making filed by Michael Harding (petitioner), which seeks to allot Channel 260A to Campbellsville, Kentucky, as a second local broadcast service.[1] Petitioner stated his intention to apply for the channel. Channel 260A can be allotted to Campbellsville in compliance with the minimum distance separation requirements.

2. In view of the fact that the requested allotment could provide a second FM service to Campbellsville, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with regard to the following community:

	Channel No.	
City	Present	Proposed
Campbellsville, Kentucky	280A	260A, 280A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **July 18, 1988,** and reply comments on or before **August 2, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Steven C. Schaffer
Schwartz, Woods and Miller
1325 Eighteenth Street, N.W.
Suite 206, The Palladium
Washington, D.C. 20036
(Attorney for petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates for Channel 260A at Campbellsville (city reference) are 37-20-36 and 85-20-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ATLANTIC RICHFIELD
COMPANY

Petition for Emergency Relief and Declaratory
Ruling with Respect to Registered Terminal
Equipment and Private Microwave
Interconnection to Telephone Service of
Southwestern Bell Telephone Company

ERRATUM

Released: May 26, 1988

1. In *Atlantic Richfield Co.*, FCC 88-23, released February 24, 1988, paragraph 3, the italicized material in the sentence below was omitted due to electronic reproduction error:

> In 1983, however, ARCO decided to terminate most of its Direct-Inward-Dialing (DID) trunks with General Telephone, obtain additional trunks from Southwestern Bell, and directly connect its Plano *lab to the DID trunks in Dallas obtained from Southwestern Bell, by means of* its private microwave facilities running between Dallas and Plano.

Atlantic Richfield Co., supra, is corrected to add thisomitted material (without italics). Footnote references appearing in the original item have not been indicated above; such references and footnotes are unchanged.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

EAU CLAIRE CELLULAR TELEPHONE COMPANY, L.P. File No. 00809-CL-L-88

For license to cover construction permit for Station KNKA 673 to operate on Frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Eau Claire, Wisconsin Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1988; Released: May 26, 1988

By the Chief, Mobile Services Division:

1. Eau Claire Cellular Telephone Company, L.P. (ECCTC) has filed an application for a radio station license to cover its construction permit to operate in the Domestic Public Cellular Radio Telecommunication Service on frequency Block B in Eau Claire, Wisconsin. R.B.C Cellular Enterprises, Inc., (RBC)[1] has filed a petition to defer the issuance of the covering license and ECCTC has replied.

2. RBC requests that the Commission delay granting operating authority to ECCTC for six months, or until RBC's own cellular construction permit is issued,[2] whichever comes first. RBC maintains that the wireline's headstart will diminish RBC's ability to compete with the wireline carrier and to provide a check upon the pricing and service offered by the wireline in the Eau Claire MSA. In addition, RBC states that its financing commitment, while firm, is conditioned upon receipt of a construction permit. Therefore, it cannot draw upon its financing to establishing resale operation in Eau Claire.

3. In its opposition, ECCTC asserts that RBC has failed to meet its burden of providing specific and compelling evidence that early wireline entry will foreclose development of a competitive market, as required by *Cellular Order on Reconsideration*, 89 FCC 2d 58, 75 (1982). ECCTC points out that RBC has presented no statistical or other evidence to prove that ECCTC's cellular entry will foreclose the development of a competitive market. ECCTC contends that RBC's pending investigation by the Commission and the Department of Justice, and its alleged inability to establish a resale operation prior to the award of its construction permit, are irrelevant to the determination as to whether headstart relief is warranted.

4. In the past, the Commission has emphasized that it would defer action on a wireline application only "[w]here it can be demonstrated in a particular case that harm to the public will result from allowing the wireline carrier an early entry into the market involved. *Cellular Order*, 86 FCC 2d 469, 492 (1981), modified on reconsideration, 89 FCC 2d 58. The Commission has stated repeatedly that a party requesting deferral of wireline operating authority "[b]ears a heavy burden of demonstrating that such action would be in the public interest." *Cellular Order on Reconsideration*, 89 FCC 2d 75 at n.32. The public interest, in this context, consists of expeditious provision of cellular service to the public. The Commission's goal for cellular radio is not to guarantee the economic well-being of any applicant or licensee, but rather to further the public interest in receiving reliable, economic service as soon as possible. *Cellular Order*, 86 FCC 2d at 491, and *Cellular Order on Reconsideration*, 89 FCC 2d at 74-75.

5. Based on a review of its petition, we find that RBC has failed to satisfy its heavy burden of demonstrating that early wireline entry will so jeopardize the development of a competitive market in Eau Claire as to be contrary to the public interest. RBC has not presented any statistical or other evidence of any possible anticompetitive effects or that ECCTC's entry now will be detrimental to the public. With regard to the resale issue, the Commission 's policy prohibiting restrictions on resale was created as a safeguard to promote competition between the two entities authorized in each area. However, RBC's allegation that it is unable financially to establish itself as a reseller has no bearing on the issue of whether grant of the instant application is in the public interest. We believe that the public interest would best be served by allowing ECCTC to provide service to Eau Claire.

6. Accordingly, IT IS ORDERED, That the application of Eau Claire Cellular Telephone Company, L.P. for a covering license, File No. 00809-CL-L- 88, is GRANTED.

7. IT IS FURTHER ORDERED, That the Petition to Defer filed by R.B.C. Cellular Enterprises, Inc. IS DENIED.

8. This order is issued under Section 0.291 and Section 1.108 of the Commission's rules and is effective on its adoption date. Petitions for reconsideration under Section 1.106 and applications for review under Section 1.115 may be filed within 30 days of the date of the public notice of this Order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] RBC is the tentative selectee for frequency block A in Eau Claire.

[2] RBC's application has not been granted because RBC's majority owner is the subject of a pending investigation by the Commission and the Department of Justice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC BELL AAD 6-1463

Request for Authority to Provide
Asynchronous/X.25 Protocol
Conversion for its "Victoria"
Technology on an Unseparated
Basis for a One-year Trial Period

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 1988; Released: May 26, 1988

By the Commission:

I. INTRODUCTION

1. Pacific Bell (Pacific) has filed an Application for Review (the application) of the Common Carrier Bureau's March 30, 1987 *Waiver Order* herein.[1] In the *Waiver Order*, the Bureau granted Pacific's request for authority to provide asynchronous to X.25 protocol conversion for low speed channels of a new derived channel digital transmission technology (the Victoria technology). The Bureau concluded that the multiplexer Pacific proposed to locate on the customer's premises was customer premises equipment (CPE), and granted Pacific a waiver of Section 64.702 of the rules (the *Computer II* rules) to provide that equipment on a nonseparated basis. Pacific asserts in the application that the multiplexer is part of the network, not CPE, and urges us to overrule that portion of the *Waiver Order*. We find that we do not need to resolve at this time the question of whether the Victoria multiplexer is network equipment or CPE. However, to the extent a waiver of Section 64.702(e) of the rules is necessary to permit Pacific to conduct its trial by offering the premises multiplexer as part of the tariffed Victoria service, we grant it. We reserve a final decision on the regulatory status of the Victoria multiplexer until such time as Pacific decides to make a general service offering.

II. BACKGROUND

2. In a June 4, 1986 letter to the Chief of the Common Carrier Bureau (the June 4 Letter), Pacific requested authority to provide asynchronous to X.25 protocol conversion for the low speed channels of its Victoria technology. The Victoria technology allows the simultaneous transmission of five data and two voice channels over a standard wire pair, through the use of multiplexers at the central office and on the customer's premises. Pacific stated that the trial would be held in two locations, each for a six-month period, and that the trial locations will involve up to 5000 termination points and 30 or more service providers. Pacific planned to obtain permission from the California Public Utilities Commission (CPUC) for the rates to be charged, and stated that it would account for the protocol conversion investment and expenses according to this Commission's *Protocol Waiver Order*.[2] Pacific also stated that, in its view, the premises multiplexer was not CPE, because it fell within the "multiplexer exception" to the *Computer II* rules. [3] Pacific stated that "should the Commission disagree, Pacific hereby requests such a waiver to provide the multiplexer on the customer's premises for the duration of the Victoria trial period."[4]

3. Six parties filed comments on Pacific's request. Several contested Pacific's position that the premises multiplexer is not CPE and argued that it may not be offered as part of the tariffed service. They also stated that Pacific's request for a waiver of the rules fell short of satisfying the requirements for grant of a waiver. Parties also raised questions about Pacific's protocol conversion proposal. After reviewing these comments, the Bureau, by letter dated July 31, 1986, requested additional information about the nature and functionality of the Victoria multiplexer. Pacific responded on October 23, 1986, and other parties commented on its response.

4. In the *Waiver Order*, the Bureau concluded, *inter alia* that the Victoria premises multiplexer was CPE. The *Waiver Order* found that the equipment performed functions other than the delivery of multiple channels to the customer over a single wire pair loop, including both network channel terminating equipment (NCTE) and modem functions. In accordance with this Commission's decision in the *LADT Order*,[5] the Bureau concluded that such equipment did not fall within the multiplexer exception to the *Computer II* rules and that Pacific must provide the Project Victoria equipment as CPE on an unbundled, detariffed basis.[6] Consistent with Pacific's alternative request for a waiver, the Bureau waived the *Computer II* rules for one year so that Pacific could provide the equipment during the trial on a nonseparated basis.[7]

III. SUMMARY OF PLEADINGS

5. In the application, Pacific asks that the *Waiver Order* be modified so that the premises multiplexer is not considered to be CPE, but rather is treated as a multiplexer " . . . expanding the network in a way transparent to users who would continue to use standard network interfaces."[8] Pacific bases this request on three grounds. First, it asserts that the multiplexer falls within the "multiplexer exception." It states that if the multiplexer were placed outside the customer's premises, it would without question be treated as part of the network. Pacific states that moving the equipment from the outside onto the premises does not transform it to CPE, because it provides no additional functions on the premises and the customer still would interconnect its CPE to standard interfaces. It also asserts that there is a distinction between the premises multiplexer and CPE multiplexers. In its view, CPE multiplexers are required on both ends of a transmission channel and the multiplexed signal is transparent to the network. The Victoria technology, in contrast, "requires a remote multiplexer at only one end of the transmission link and the multiplexing function is part of an integrated network offering which is transparent to the end users."[9] This distinction, in Pacific's view, is the key to determining whether a multiplexer is considered to be CPE, not whether it performs analog/digital conversions or has a standard CPE interface.[10]

6. Pacific also asserts that the *Waiver Order* has established a clear disincentive for the development of loop technologies demanded by the marketplace.[11] It states that carriers will be encouraged to place multiplexers outside customers' premises rather than inside, increasing capital costs and "unsightly loop plant." It also states that the *Waiver Order* conflicts with the *Computer III Phase I Order* [12] because that Commission order encouraged technology which would increase connectivity to the local loop. The classification of the premises multiplexer as CPE, in Pacific's view, " . . . would inevitably freeze the design of loop technologies at unsuitable points and provide disincentives for continued network development."[13]

7. Finally, Pacific argues that the administrative burdens of complying with the *Waiver Order* undermine its ability to use the technology for network provisioning.[14] It states:

> The administrative and technological burden of a requirement for twelve month advance disclosure of changes in network multiplexing technologies would stymie efforts to increase loop functionality. Loop plant distribution can not be improved in any reasonable manner if engineers are constrained to utilizing existing internal network interfaces or waiting twelve months before any change in an internal network interface could be implemented.[15]

It states that if the *Waiver Order* is affirmed, carriers subject to the network disclosure rules have no incentive to meet customers' needs for new loop technologies. It concludes that such results are contrary to Congressional policies designed to encourage technological innovation.

8. IDCMA opposes Pacific's application. It first asserts that the application fails to meet the requirements of Section 1.115(b) of the rules because it fails to state plainly the questions presented for review and does not specify with particularity the factors which warrant Commission consideration of the questions presented. IDCMA also states that Pacific has not identified conflicts with established law or erroneous findings of material facts or procedural errors. *See* Section 1.115(b)(2). IDCMA also asserts that Pacific has not attempted to refute the reasoning of the *Waiver Order*, but rather is attempting improperly to litigate the multiplexer exception definition which is at issue in the *Third Computer Inquiry*.[16]

9. IDCMA also disputes the merits of Pacific's application. It states that Pacific understates the functionality of the premises multiplexer, and that the *LADT Order* clearly holds that the existence of multiplexing capability will not convert premises equipment that otherwise is treated as CPE to network equipment. IDCMA disagrees with Pacific's argument that the multiplexer is not CPE because it would be considered part of the network if it were located off the customer's premises. It asserts that this is true of many pieces of equipment now defined as CPE, and that in any event the remote multiplexer is not designed to be used outside. IDCMA next states that the interface on the premises multiplexer is not a standard network interface, but rather the standard interface between CPE and a computer terminal. If this Commission were to define the RS-232 interface to be a network interface, according to IDCMA, many items of CPE would no longer be subject to competition because the carriers would have extended the network boundary further onto the premises, and would be the sole providers of the equipment up to that point. IDCMA also disagrees with Pacific's distinction between the Victoria multiplexer and "CPE multiplexers." It states that in other services, such as data-over-voice, the central office multiplexer is provided under tariff and the premises multiplexer is provided on an unregulated basis. The Victoria technology is, according to IDCMA, similar to these offerings. IDCMA also argues that the Victoria technology does not provide whole-bandwidth channels to the subscriber, and the customer is not indifferent to whether the channels are delivered on individual loops or on a multiplexed basis, because the derived voice channels allow data rates lower than those available on an ordinary voice channel. IDCMA asserts that Pacific's concerns about network disclosure raise questions which may be considered only in a Rule Making proceeding, not in this proceeding. Finally, IDCMA disagrees with Pacific's position that the *Waiver Order* will freeze the design of loop technologies and reduce incentives for network development, and is inconsistent with other federal policies.

10. IBM also opposes Pacific's application. It states that the *Waiver Order* is a correct and straightforward application of this Commission's procompetitive policy for the development of CPE. It asserts that the issues here are similar to those resolved in the *LADT Order*. IBM also disputes Pacific's position that classification of the premises multiplexer as CPE will diminish the incentive to innovate and develop loop technologies. It also states that many functions now provided by CPE could be performed in the network, and that Pacific's proposed expansion of the multiplexer exception to include equipment such as the premises multiplexer "would permit that exception to nullify the rule of CPE deregulation . . . ."[17]

11. The American Newspaper Publishers Association (ANPA) filed comments. It states that the Victoria technology would be useful to its members, and asserts that Pacific has raised valid concerns that a literal application of the *Computer II* rules would not serve the public interest in all cases. In ANPA's view, the premises multiplexer appears to be akin to basic service multiplexing, and the possibility of anticompetitive harm from a limited test is small compared to the potential benefits. Thus, ANPA urges this Commission to be flexible in our application of the *Computer II* definition of CPE. It states that we should grant a limited waiver for the purposes of the trial period, and pursue in another proceeding the appropriate regulatory treatment of enhanced transmission technology involving equipment located on the customer's premises.

12. The Honorable Gwen Moore, Chairwoman of the Committee on Utilities and Commerce of the California State Assembly, filed comments in support of Pacific's application.[18] Chairwoman Moore asserts that the *Waiver Order* is misdirected because application of the *Computer II* policy in this regard works against the formation of a vigorous information services market. She states that Project Victoria appears to solve the problems of "ubiquity and affordability" by adapting the public network to the distribution of information services, and that Pacific, unlike its competitors, is willing to conduct the trial for a variety of users in both affluent and nonaffluent areas. She urges us to grant the request for a one-year trial, after which this Commission and the CPUC can examine in greater depth the implications of offering information services over the public telecommunications network.

13. In its reply,[19] Pacific maintains that the premises multiplexer is not CPE and that the *Waiver Order* is "in conflict with the clear Commission policy that encourages carriers to reduce loop costs and increase loop connectivity through the use of multiplexing technologies."[20] It states that network multiplexing is the only technology available to increase loop efficiency and functionality in a reasonable manner, and that the *Waiver Order* will unjustifiably stunt the development of new network technologies. Pacific asserts that the fact that the multiplexer terminates a digital line and performs some modem-like functions does not make it CPE, because these functions are essential to all loop multiplexing. It also states that the *Waiver Order* places its investment in the Victoria project at risk, and that it did not intend to develop the premises multiplexer as CPE and has no evidence that it is viable as such. Pacific also states that some manufacturers have expressed interest in pursuing the technology only if the multiplexer is considered to be part of the network, not a consumer product. It concludes that a waiver for the purpose of the trial is inadequate and that it will not further develop the Victoria technology unless this Commission overturns the *Waiver Order*.[21]

IV. DISCUSSION

14. While we conclude that Pacific's application is properly before us,[22] we see no need at this time to rule on whether the Victoria equipment should be classified as CPE or treated as part of the regulated network. We believe that the record in this proceeding demonstrates that in this particular case, involving a trial of new technology, permitting Pacific to offer the multiplexer as part of the tariffed Victoria service during the trial period would serve the public interest. The considerations which lead us to this conclusion are best described in the context of our evolution of the policy concerning carriers' provision of CPE.

A. *General*

15. In the *Computer II Final Decision*, we concluded that Title II regulation of CPE was no longer warranted. We found that deregulation "fosters a regulatory scheme which separates the provision of regulated common carrier services from competitive activities that are independent of, but related to, the underlying utility service."[23] Several key considerations led to our decision. First, we found that our procompetitive policies for CPE had created a market in which vigorous competition among equipment vendors was providing new and innovative types of CPE. This afforded the public a wider range of terminal choices at lower costs, and led to other benefits such as improved maintenance and reliability.[24] Another important factor in developing our policy was our concern that the carriers' practice of bundling CPE charges with charges for basic services introduced complexities in our efforts to insure that rate structures avoided discrimination among service offerings. We noted that terminal equipment costs represent a large portion of non-usage sensitive costs, and the bundling of these costs with usage sensitive costs might distort the prices for the CPE or basic services, contrary to our policy that the rates for major service categories must reflect the costs of providing those services.[25] We found that when CPE is subject to the separations process, the bundling of CPE and basic services could thwart the competitive provision of CPE. We required that the provision of CPE be unbundled from the provision of transmission services, with its costs removed from the rate base.[26]

16. In our assessment of the competitive market for CPE, we noted that there were hundreds of manufacturers and suppliers of equipment such as modems, terminals, and multiplexers.[27] Given the variety of products and suppliers, we were confident that the detariffing and unbundling requirements applicable to these items would not adversely affect consumers. Carriers would have the same regulatory status as other equipment vendors, and in fact would achieve a degree of flexibility to respond to market forces which they did not have when the CPE was offered pursuant to tariff.[28] However, we decided that certain equipment located on customers' premises should not be included within this regulatory scheme at that time. Accordingly, we stated that CPE that must be unbundled and detariffed did not include "over voltage protection equipment, inside wiring, coin operated or pay telephones, and multiplexing equipment to deliver multiple channels to the customer."[29]

17. Competition in the CPE market continued to be vigorous during the transition to the new regulatory scheme for carriers' provision of CPE.[30] During this period, we have had occasion to assess whether certain types of equipment should be exempt from our CPE regulatory policies, but we have not questioned the wisdom of the general prohibition against offering CPE as part of a tariffed service. Recognizing the inherent potential for including CPE as part of a tariffed offering, we have " . . . placed a high threshold burden on a carrier to demonstrate that a particular type of equipment located on the customer's premises should be considered part of a common carrier offering."[31] The issue of what constitutes "multiplexing equipment to deliver multiple channels to the customer" was considered in the *LADT Order*.[32] The *LADT Order* stated that it is "established policy" that equipment on a customer's premises which performs functions that include multiplexing, is normally treated as CPE. We explained that the rationale for establishing the special category of multiplexers in the *Computer II Final Decision* was to permit carriers to improve the efficiency of utilization of their loop plant by using available bandwidth to carry multiple channels, rather than constructing multiple loops. As an example of such use, we cited "subscriber loop carrier," which allows multiple customers to receive individual telephone service through carrier-provided multiplexing equipment where multiple loops are not available.[33] We explained that the multiplexer exception is applicable when the subscriber neither necessarily knows nor cares whether the multiple channels ordered from the carrier are multiplexed, and is indifferent to whether they are delivered on individual loops or on a multiplexed basis.[34]

18. In the *LADT Order*, we reviewed the technical characteristics of the equipment which the carrier asserted to be part of the network, and concluded that it did not fall within the multiplexer exception. The subscriber for the service in issue ordered a single service and used premises equipment to create two subchannels. We noted that the equipment did more than multiplex channels. Functions performed by the equipment in question included the conversion of baseband binary digital signals into a form compatable with analog transmission media, traditionally a modem function. We found that if a carrier could define equipment to be part of the network by

associating a multiplexing function with features which have traditionally been treated as CPE, it could avoid the *Computer II* requirements for a wide variety of equipment. We further found that the functionality of the equipment exceeded that which may be associated with basic service, because it included functions which were treated as CPE functions in our orders involving NCTE, and modem-like functions that were clearly CPE.[35]

19. In the *Computer III Phase I Order* [36] we determined again that NCTE provided by carriers constitutes CPE for regulatory purposes. We sought further comment as to whether we should modify the multiplexer exception, and whether there are certain NCTE functions that the carriers should be allowed to provide on a regulated basis due to technical and efficiency factors. In the *Computer III Phase II Order*, we declined to alter the limited nature of the multiplexer exception. Although we found that the BOCs' limited use of multiplexers to deliver basic, tariffed services may increase the efficiency of existing plant, we were unwilling to allow them to provide multiplexing as a tariffed service on customers' premises as a general matter, even if the function were confined to the network side of the demarcation point.[37]

20. In the *Computer III Phase II Order*, we also determined that only one NCTE function, remote-activated loopback testing, could be provided by carriers on a regulated basis, if it is provided just on the carrier's side of the demarcation point. We found that remote loopback testing in this configuration does not interfere with other NCTE functions provided by CPE, and increases the efficiency of carriers' location of service problems. We permitted the carriers to offer this function on either a bundled or unbundled basis. We denied requests for carrier provision of other NCTE functions on a tariffed basis, and stated that we would grant a waiver of the prohibition in particular cases when appropriate.[38]

21. In the *Computer III Phase II Reconsideration Order*, we further refined the scope of the multiplexer exception. We retained the exception for equipment that carriers have been providing as a regulated offering thereunder, and for updated or improved versions of such equipment. However, requests to provide multiplexing and other NCTE functions on a regulated basis through equipment located on customers' premises will hereafter be considered on a case-by-case basis. Such waiver requests are to be granted when a carrier demonstrates that "its proposed offering, through regulated equipment located on customer premises, of non-loopback NCTE functions like multiplexing will serve the public interest by increasing the efficiency, or making technically possible the delivery, of a particular basic service, and that the provision of such functions through unregulated CPE will not permit attainment of comparable efficiencies or service offerings."[39] We concluded, upon review of the record on reconsideration, that expansion of the multiplexer exception is not an effective way to promote network efficiency, and that continued promotion of a competitive market for CPE and the efficiencies that competition brings will better serve the public interest.[40]

B. *The Victoria Premises Multiplexer*

22. As mentioned above, Pacific requests that we define the premises multiplexer used in the Victoria technology as part of the network. Although we have significant reservations whether Pacific's request is consistent with the policy considerations discussed above, we see no reason to rule definitively on that request at this time.[41] The Victoria equipment at issue in this proceeding potentially could provide customers with improved functionality and service.[42] Rather than attempting to rule on the regulatory status of the Victoria equipment at this time, we believe that a trial of the equipment as proposed by Pacific could provide more concrete data on the viability of Project Victoria as well as the proper regulatory treatment of the Victoria equipment located on customer premises. Thus, we permit the trial to take place, without reaching the question of the regulatory status of the Victoria equipment.

23. Section 64.702(e) of the Commission's Rules prohibits carriers from offering CPE on a tariffed basis. Because we have not ruled definitively on the regulatory status of the premises multiplexer, we must on our own motion consider whether Pacific should be allowed to offer the Victoria technology for the trial period under a single tariff, rather than lease or sell the premises multiplexer as a separate unit, thus creating the possibility of a wider customer base for the trial. We find that for the purposes of the trial, Pacific should be allowed to bundle the charges for the multiplexer with the costs of the basic service. Generally speaking, there is some merit to the argument that customers for a limited trial period would be unwilling to purchase or rent the multiplexing equipment separately.[43] The potential harm from this limited waiver would be minor compared with the valuable experience Pacific might gain regarding the new technology. Thus, we will waive to the extent necessary Section 64.702(e) of the rules for a one-year trial period.[44] If, at the end of this period, Pacific proposes to offer the technology on a permanent, tariffed basis, we will at that time assess Pacific's arguments pursuant to the standard for multiplexing established in the *Computer III Phase II Reconsideration Order*.[45]

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that Pacific Bell's Application for Review of the *Waiver Order* IS DENIED.

25. IT IS FURTHER ORDERED, that Pacific Bell IS GRANTED a waiver of Section 64.702(e) of the Commission's Rules to the extent necessary so that it might offer the premises multiplexer as part of the tariffed Victoria technology for one year following the date upon which the trial commences.[46]

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] Pacific Bell, Request for Authority to Provide Asynchronous/X.25 Protocol Conversion for its "Victoria" Technology on an Unseparated Basis for a One-year Trial Period, 2 FCC Rcd 4411 (1987) (*Waiver Order*).

[2] Petitions for Waiver of Section 64.702 of the Commission's Rules, 100 FCC 2d 1057 (1985) (*Protocol Waiver Order*).

[3] 47 C.F.R. §64.702 (1984). *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (*Final Decision*), *recon.* 84 FCC 2d 50 (1980), *further recon.* 88 FCC 2d 512 (1981), *aff' d sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F. 2d 198 (D.C. Cir 1982), *cert. denied* 461 U.S. 938 (1983), *second further recon.* FCC 84-190 (released May 4, 1984). The "multiplexer exception" is set forth at note 57 of the *Final Decision*.

[4] June 4 Letter at 1.

[5] Petition for Declaratory Ruling that the Southern Bell Telephone and Telegraph Co. Offer its Local Area Data Transport Service on an Unbundled and Detariffed Basis Pursuant to Section 64.702 of the Commission's Rules, 58 RR 2d 374 (1985) (*LADT Order*), *recon.* FCC 86-122 (released March 25, 1986).

[6] *Waiver Order*, 2 FCC Rcd at 4414.

[7] No party appealed the Bureau's conclusion that Pacific's protocol conversion demonstration of compliance met applicable Commission requirements. Nor did anyone seek review of the Bureau's waiver of the *Computer II* rules to permit Pacific to provide the Victoria equipment on a nonseparated basis. Accordingly, those parts of the *Waiver Order* are final.

[8] Application at 2.

[9] *Id.* at 5. This description is different than that contained in the June 4 Letter. Pacific there stated that the Victoria technology " . . . consists of a multiplexer located on the end user's premise and another at a central office . . . ." June 4 Letter at 1.

[10] Application at 5.

[11] *Id.* at 2.

[12] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *recon.* 2 FCC Rcd 3035 (1987), *further recon.* 3 FCC Rcd 1135 (1988).

[13] Application at 8.

[14] The Bureau, by classifying the Victoria technology as CPE, required Pacific to comply with the network disclosure and customer proprietary network information requirements of the *BOC CPE Relief Order*. 2 FCC Rcd at 4414, *citing* Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, 2 FCC Rcd 143, *recon.* 3 FCC Rcd 22 (1987).

[15] Application at 6-7.

[16] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.* 3 FCC Rcd 1150 (1988) (*Computer III Phase II Reconsideration Order*.

[17] IBM Opposition at 10.

[18] These comments were not timely filed or accompanied by a petition to accept late-filed pleading. However, we will exercise our discretion and include that document in the record of this proceeding.

[19] The Bureau invited Pacific to respond to the oppositions to its application. *See* 47 CFR §1.115(f).

[20] Reply at 1, *citing Computer III Phase I Order, supra*.

[21] Reply at 4. Pacific also asserts that it has met the procedural requirements pertaining to applications for review, because it clearly questioned the *Waiver Order's* determination that the premises multiplexer is CPE and set forth the erroneous basis of that determination.

[22] IDCMA's position that Pacific has not met the pleading requirements of Section 1.115 of the rules is unwarranted. Pacific properly stated the question for review -- the regulatory status of the premises multiplexer -- and contested the Bureau's application of policy and precedent in its disposition of Pacific's request.

[23] 77 FCC 2d at 447.

[24] *Id.* at 439.

[25] *Id.* at 445.

[26] *Id.* at 446.

[27] *Id.* at 440.

[28] *Id.* at 446-7.

[29] *Id.* at 447, n. 57.

[30] The vigorous competition in this market was one of the factors which led us to replace the structural separation requirements of the *Computer II* rules for the BOCs' provision of CPE with nonstructural safeguards. *See BOC CPE Relief Order*, 2 FCC Rcd at 147.

[31] Petitions *See* king Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network, 94 FCC 2d 5, 15 (1983) (*NCTE Order*). In that proceeding, we rejected carriers' arguments that certain types of NCTE located on customers' premises were an integral part of the network, rather than CPE.

[32] *See* note 5, supra.

[33] LADT Order, 58 RR 2d at 378, n. 34.

[34] *Id.* at 379.

[35] *Id.* at 380.

[36] Note 12, supra.

[37] 2 FCC Rcd at 3106.

[38] *Id.* at 3105.

[39] Computer III Phase II Reconsideration Order, 3 FCC Rcd at 1167.

[40] We also rejected general policy arguments like those made by Pacific here that a limited multiplexer exception would stunt the development of network technology because of network disclosure requirements. We indicated, however, that in particular cases network interface standards might indeed be so unstable as to require specification changes on shorter notification than specified in our network disclosure rules. Determination of whether special accomodation should be made would have to depend on the facts of the particular case. Computer III Phase II Reconsideration Order, 3 FCC Rcd at 1168, n.248.

[41] In view of this ruling, we need not address Pacific's assertions that the Bureau's decision will stunt the development of network technology, or that the Victoria multiplexer performs functions essential to all loop multiplexing. We have established criteria for considering requests to provide multiplexing functions on a regulated basis through equipment located on the customer's premises (see para. 21, supra). Pacific's assertions will be considered, if necessary, when and if it seeks to provide the premises multiplexer on a permanent basis.

[42] Pacific's concern about the willingness of vendors to manufacture the premises multiplexers if they are treated as CPE (see para. 12, supra) appears to be unfounded. Pacific does not assert that multiplexers required to conduct the trial will not be available. Moreover, at least one manufacturer with which Pacific is negotiating is willing to consider production of the multiplexers whatever their regulatory classification. See Letter from James L. Casserly to Gerald Brock, October 14, 1987, at Attachment pp. 2-3.

[43] See, e.g., Southwestern Bell Telephone Company, Request for Permission to Provide CPE to Certain Users During ISDN Trial, 2 FCC Rcd 5911 (1987).

[44] During this trial period, Pacific shall not interfere with customers' current inside wiring maintenance contracts, or their rights established in the decisions in CC Docket 79-105, in providing the Victoria technology under this limited waiver. Moreover, Pacific is obligated to comply with the safeguards established in the BOC CPE Relief Order in conducting the trial.

[45] We emphasize that any showings or arguments that Pacific may make in attempting to show that it satisfies our standard must be specific and well documented. We have noted, for example, that it could be relevant to show specifically that discrepancies between the price and cost of local loops skew customer choice to a degree that carriers are unable to realize real efficiencies available from loop multiplexing provided through unregulated CPE. See Computer III Phase II Reconsideration Order, 3 FCC Rcd at 1167, n. 247.

[46] Pacific shall notify the Chief, Common Carrier Bureau in writing when the trial begins.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-119

In re applications of

Gaynell L. Fordham d/b/a SABINE BROADCASTING	File No. BPH-850322MK
BREEZE BROADCASTING COMPANY, LTD	File No. BPH-840503IC
MARANATHA BROADCASTING COMPANY, INC.	File No. BPH-850712ME
J. MCCARTHY AND JUNE J. MILLER	File No. BPH-850712NT
GULF BREEZE BROADCASTING CO.	File No. BPH-850712OE

For Construction Permit for a
New FM Station in Gulf Breeze, Florida

MEMORANUM OPINION AND ORDER

Adopted: May 17, 1988; Released: May 27, 1988

By the Commmission:

1. Before the Commission is an unopposed "Withdrawal of Petition for Reconsideration" (withdrawal petition) filed March 18, 1988 by Gaynell L. Fordham, d/b/a Sabine Broadcasting. On May 29, 1987, Sabine filed a petition for reconsideration of the Hearing Designation Order, 2 FCC Rcd 2508 (1987), which dismissed Sabine's application for a new FM station to serve Gulf Breeze, Florida on Channel 237A. Because Sabine's withdrawal petition did not reference the docket number of the proceeding, it was not associated with the petition for reconsideration pleadings. Thus, on April 15, 1988, the Commission was unaware of the withdrawal petition and acted on Sabine's petition for reconsideration (Report No. DC-1152, released April 19, 1988).

2. Gaynell L. Fordham, under penalty of perjury, declared that she has not been paid or promised, directly or indirectly, by any person or entity, any monetary or other consideration of any kind whatsoever, in connection with her decision to withdraw and dismiss the petition for reconsideration. In view of the circumstances, we will grant Sabine's request to withdraw its petition for reconsideration and vacate our action of April 15, 1988.

3. ACCORDINGLY, IT IS ORDERED, pursuant to 47 C.F.R. § 1.108, that the "Withdrawal of Application for Review" filed March 18, 1988 by Sabine Broadcasting IS GRANTED and the action of the Commission of April 15, 1988, FCC 88-144, reinstating the application of Sabine Broadcasting for a new FM station on Channel 237A in Gulf Breeze, Florida IS VACATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ATLANTIC RICHFIELD COMPANY

Petition for Emergency Relief and Declaratory Ruling with Respect to Registered Terminal Equipment and Private Microwave Interconnection to Telephone Service of Southwestern Bell Telephone Company

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1988; Released February 24, 1988

By the Commission:

1. Before the Commission are Applications for Review of the Common Carrier Bureau's Memorandum Opinion and Order (Order), Mimeo No. 1115, released November 27, 1985, invalidating a decision of the Texas Public Utility Commission (Texas PUC). The Texas PUC decision held that Southwestern Bell Telephone Company (Southwestern Bell) was indirectly providing exchange services into the certificated serving area of General Telephone of the Southwest (General or General Telephone) in violation of state law by providing interconnection to the public switched telephone network (PSTN) at an office complex of the Atlantic Richfield Company (ARCO). In its decision, the Bureau found that the Texas PUC decision unlawfully interfered with the federal right telephone subscribers have to use their terminal equipment in ways that are privately beneficial without being publicly detrimental.

2. The applications for review were filed by General, the State of Texas, the United States Telephone Association (USTA), and the National Association of Regulatory Utility Commissioners (NARUC). Comments in support of General Telephone's filing were submitted by Dobson Telephone Company, Inc. (Dobson). Oppositions to the applications for review were filed by ARCO, Southwestern Bell, the American Petroleum Institute (API) and the Utilities Telecommunications Council (UTC).[1] For the reasons stated below we will deny the applications for review.

BACKGROUND

3. ARCO operates extensive private interstate microwave facilities (known as ARCOnet) providing voice and data capabilities between its corporate operating centers throughout the United States. In Texas, ARCO has corporate offices in Dallas and a major research lab and other offices in Plano. Dallas is within the serving area for which Southwestern Bell holds an exclusive state franchise; Plano is within General Telephone's franchised serving area. ARCO's Plano and Dallas premises are connected by point-to-point private microwave facilities licensed to ARCO by this Commission. The ARCOnet system is additionally connected at various locations to the PSTN. Such interconnections to the PSTN are necessary for the transmission of calls -- interstate, intrastate, and local and voice and data -- to and from locations not served by ARCOnet, *i. e.* off-ARCOnet calls. In addition to other locations throughout the country, the ARCOnet system is interconnected to the PSTN at both Plano and Dallas. This is done by means of telephone lines extended by the respective serving carrier to the Dallas and Plano offices where the lines are connected by ARCO to PBX's at both locations. Prior to 1983, ARCO relied upon the connections with General Telephone at Plano for off-ARCOnet calls to and from the Plano lab and the connections with Southwestern Bell at Dallas for off-ARCOnet calls to and from its Dallas offices. In 1983, however, ARCO decided to terminate most of its Direct-Inward-Dialing (DID) trunks with General Telephone, obtain additional trunks from Southwestern Bell,[2] and directly connect its Plano its private microwave facilities running between Dallas and Plano. [3] ARCO stated that it did so because it was unhappy with the quality and reliability of the interconnection services it was receiving at Plano from General. According to ARCO, under this arrangement, General Telephone would continue to handle local calls to and from the Research Center in Plano, but the new interconnection in Dallas would handle all other off-ARCOnet traffic to and from the Center and thus would displace most of the trunk lines and Direct Inward Dial (DID) numbers previously supplied by General Telephone.[4] Southwestern Bell and General provide an Extended Area Service (EAS) encompassing Dallas and Plano. Under this service arrangement calls between Plano and Dallas over the PSTN are billed as local service without toll charges.

4. In July 1983, General asked the Texas PUC to order Southwestern Bell to cease and desist from providing the additional DID lines ARCO had obtained at Dallas. On October 26, 1983, ARCO filed a "Petition for Emergency Relief and Declaratory Ruling" with this Commission requesting that Southwestern Bell be directed to continue to provide the DID trunks connected by ARCO by means of its private microwave facilites to its Plano lab. The Bureau deferred action on ARCO's petition, however, until the Texas PUC made a decision on General's request.[5] The Texas PUC granted General's request for a Cease and Desist Order on July 8, 1985. That order reversed a hearing examiner's finding in favor of ARCO and Southwestern Bell and found that Southwestern Bell was providing telephone service outside its certificated area. The PUC further found that the private benefit of the ARCOnet system interconnection is outweighed by public policy in favor of planning by local telephone companies and the avoidance of stranded investment. Southwestern Bell was ordered to cease providing the services in question to ARCO.[6]

5. ARCO then renewed at this Commission its previously filed petition for declaratory relief. On November 22, 1985, the Chief, Common Carrier Bureau granted ARCO's request, concluding that Southwestern Bell's provision of PSTN services to ARCO at Dallas involved a federal question within the province of this Commission; that Southwestern Bell is obliged, under federal policies and its own tariffs, to provide ARCO the interconnection it sought; and that ARCO is permitted, under federal

policies, to use and interconnect its facilities to the PSTN in a manner that it found to be privately beneficial without being publicly detrimental. The Bureau found that allegations of harm to General were unsubstantiated. It found, for example, that there was no showing of the extent to which it would suffer economic loss, or that any loss would impair its ability to serve the public. Finally, the Bureau noted that customers could use other technologies (such as satellite facilities) which would reduce reliance on a serving telephone company and have the same impacts complained of by General. The Bureau found ordering customers not to use those technologies is not a permissible way to avoid those impacts.

APPLICATIONS FOR REVIEW AND OPPOSITIONS

6. Those seeking review of the Bureau's decision basically reiterate the arguments made previously in this proceeding. Generally, they maintain that (1) the issue is not one of interconnection to the PSTN, but of enforcement of local exchange service boundaries; (2) the Texas PUC's order did not interfere with ARCO's right to interconnect its terminal equipment into the PSTN; (3) the Bureau erred in concluding there was no evidence of public detriment by the ARCO service arrangement and, in fact, it will promote waste and duplication; and (4) the Bureau's reliance on the *Heritage Village* case was misplaced.[7]

7. The parties claim that the instant case is an intrastate matter that does not warrant federal preemption. The State argues that the PUC's authority to regulate local exchange boundaries allows it to order Southwestern Bell to cease providing service to ARCO's Plano facility. In the State's view, the establishment and enforcement of local exchange boundaries is a power exclusively within the jurisdiction of the state and the Bureau has wrongfully exercised jurisdiction in this case.

8. NARUC adds that the Bureau erred in failing to acknowledge that wasteful duplication of local exchange facilities would result if Southwestern Bell were allowed to interconnect with ARCO. According to NARUC, Southwestern Bell's provision of 81 PBX trunks and 2000 DID numbers duplicates the 71 trunks and 1600 DID numbers provided by General to ARCO. Such unnecessary duplication of facilities, it argues, is generally recognized as causing a degradation in quality of service and an increase in rates for the public. These are significant public detriments, in NARUC's view, which pose a serious threat to the continuation of universal telephone service.[8] It states that ARCO's remedy for its service quality grievances against General is to bring them before the Texas PUC.

9. General argues that the Bureau's Order conflicts with prior Commission precedents by regulating local exchange services. It also believes that the Order distorts the Commission's decision in *Heritage Village*. According to General, *Heritage Village* very narrowly focused on a customer with a single unbroken premises located in two bordering local exchange service areas. It maintains that while the "limiting language" in both the Commission decision and in its briefs to the Fourth Circuit minimized the Commission's intrusion upon the rights of states to certificate local exchange areas, the Bureau's Order departs from and goes beyond the peculiar facts of *Heritage Village* without explanation. It argues the result of the Bureau's policy will be to encourage competition among local exchange companies for the large revenue producing customers which will have the effect of frustrating the local certification process. General also claims that ARCO mischaracterizes the Texas ruling as a blanket prohibition against a subscriber's use of its own private interstate microwave facilities to interconnect to the PSTN at a point outside the locally certificated telephone company's service area. General points out, however, that it did not object to the private microwave link and PBX arrangement which made interconnection to the PSTN at Dallas possible in the past. It says it objects now because, as a result of the assignment of Southwestern Bell DID numbers to Plano locations, that microwave link is being used as a vehicle to convert Dallas telephone numbers to local exchange service use in Plano.[9]

10. In opposition, ARCO maintains that the Bureau was correct in using the Commission's longstanding policies concerning a customer's right to interconnect to the PSTN in deciding this controversy. The Texas PUC, ARCO claims, has chosen to infringe upon ARCO's federally-protected interconnection rights under the guise of local exchange regulation. ARCO states that its requirement for reliable and high quality transmission of essential data and voice communications between its offices and remote operating areas prompted its decision to interconnect its Plano research center to the PSTN in Dallas through Southwestern Bell. ARCO denies that it intends to use Southwestern Bell for local exchange service in Plano. It states that it will retain a sufficient number of trunks and DID numbers from General for intra-Plano off-ARCOnet calls. *See* note 4, *supra*. ARCO states, however, that interconnection for off-ARCOnet traffic originating or terminating outside of the Plano area would be routed through the DID trunks provided by Southwestern Bell at Dallas. ARCO Urgent Request, at 2.

11. ARCO also challenges General's allegations of significant public detriment. ARCO points out that General's potential for stranded investment of approximately 300,000 for facilities and equipment out of a total investment in Texas of 2,000,000,000, is minuscule and ignores the fact that this plant also serves other customers in Plano. In addition, ARCO states that the DID numbers no longer required by it could be assigned by General to other customers.

12. Southwestern Bell argues that its provision of DID trunks, PBX trunks and DID numbers to ARCO are all within its certificated area in Dallas. These trunks, it states, are terminated by Southwestern Bell at a termination block located on ARCO's premises in Dallas. It states that these DID trunks are provided in the same manner as Southwestern Bell provides DID service to other Dallas customers.

13. Southwestern Bell states that although it is now subject to conflicting state and federal orders, the interconnection services it provided on ARCO's request were both required and lawful. Specifically, it points to a portion of its General Exchange Tariff, approved by the Texas PUC, which requires that it establish service to equipment, such as ARCO's, which has been properly registered under Part 68 of the Commission's rules. Moreover, the Texas PUC, in its hearings on General's Cease and Desist Order, found, as a matter of law, that Southwestern Bell's tariffs required this interconnection. In addition, Southwestern Bell states that its federal tariffs and Part 68 of the Commission's rules similarly require interconnection with ARCO in Dallas.

14. Southwestern Bell also argues against reversal of the Bureau's Order because Southwestern Bell would not be able to monitor the use of ARCO's service to implement an order to deny ARCO interconnection in Dallas used for communications to and from Plano. This is because, according to Southwestern Bell, it cannot determine whether the trunks and DID numbers provided to ARCO within Southwestern Bell's Dallas certificated area are being used by ARCO for its employees in Southwestern Bell's territory in Dallas or being interconnected with ARCO's private microwave facilities to reach ARCO's Plano lab within General's certificated area. Such monitoring is typically not possible, Southwestern Bell states, since the trunks and DID numbers used in conjunction with a customer's PBX and private microwave facilities, are controlled by the customer.[10] Thus, Southwestern Bell says it generally is not able to monitor whether its customers are using local exchange service provided to them within Southwestern Bell's certificated territory in conjunction with private facilities to connect with a separate premises which may lie in territory certificated to another local exchange company. Southwestern Bell states that it is also not possible to separate or distinguish between interstate and local use of the trunks and DID numbers it provides to ARCO. Opposition of Southwestern Bell to Applications for Review, filed January 28, 1986, at 8-9. This is because any DID numbers and trunks ARCO receives from Southwestern Bell at Dallas, including those it assigns to Plano stations without Southwestern Bell's knowledge or control, can be used to carry interstate as well as intrastate calls. Thus, states Southwestern Bell, ARCO employees in Plano are able to use any of the DID facilities provided to ARCO at Dallas in conjunction with their private microwave facilities to place and receive off-network interstate calls via interconnection with the public switched network in Dallas. Southwestern Bell states that for traffic passing through Dallas which originates or terminates in Plano, it is not economically or practically able to identify and block those calls which are intrastate while simultaneously permitting interstate calls to and from Plano to be completed. Supplemental Comments of Southwestern Bell, filed July 14, 1986, at 5.

DISCUSSION

15. The issue presented in this case is whether ARCO's federal right of interconnection is violated if the Texas PUC prevents it from connecting its Plano lab to the public switched network at Dallas by means of its private microwave facilities. The Bureau found that the Texas PUC decision does impermissibly infringe on ARCO's federal right of interconnection of its private microwave facilities and we agree. None of the parties has demonstrated that any of the Bureau's findings of fact or conclusions of law were in error, and we therefore deny the applications for review.

16. A telephone subscriber has a federal right, established by this Commission, and confirmed by the courts, to interconnect to the public telephone network in ways that are privately beneficial if they are not publicly detrimental.[11] This right of interconnection to local exchange facilities includes not only terminal equipment such as telephones and computers, but also communications systems provided by customers (such as PBX arrangements and private microwave systems).[12] The "public detriment" which can, as a matter of federal law, override the customer's right of interconnection, is technical harm to the telephone system or economic impact which adversely affects the ability of a carrier adequately to serve the public, or both.[13]

17. A necessary corollary of these principles has been the primacy of this right in the face of conflicting state rules and regulations. This jurisdictional rule, which has been consistently upheld by the courts, is based on a recognition of the indivisibility of the telephone network in that most communications equipment and local facilities are jointly used for interstate and intrastate services.[14] Accordingly, in cases where federal and state regulation conflict, to avoid the impractical and inefficient result of requiring duplicate networks and equipment for interstate and intrastate use, federal interconnection policies must prevail for dual-use equipment and facilities.[15]

18. There is such a conflict between state and federal interconnection policies in this case. Because of the dual interstate and intrastate use of the private microwave and carrier facilities here at issue, and the configuration of these facilities, acceding to the state action in this case would necessarily negate the federal right of interconnection to the interstate network available to ARCO and telephone customers generally.[16] The Texas PUC decision would, as a practical matter, deny ARCO interconnection through the facilities subject to the Texas PUC decision for the purpose of transmitting interstate calls originating or terminating in Plano.[17] This is a clear infringement of the customer's right to connect private facilities to the public telephone network for the provision of interstate services absent the requisite showing of public detriment.

19. The parties in this case have not demonstrated that such public detriment will result under the interconnection configuration designed by ARCO. It appears that ARCO's interconnection in Dallas would comply with all applicable federal and state tariff provisions including the Part 68 technical requirements incorporated in those tariffs, designed to protect the network from harm. While avoidance of stranded investment and disruption of the local exchange design process in theory represent areas of potential public detriment, claims of significant public detriment must be factually demonstrated and supported before they are allowed to defeat a customer's ability to interconnect and to use its equipment in a manner that it has determined best serves its communications requirements.[18] Nor has it been shown that the customer's substitution of facilities obtained from Southwestern Bell for those obtained from General constitutes a wasteful duplication of facilities. As essentially only conclusory, unsupported allegations of public detriment have been provided,[19] we agree with the Bureau that, in this case, the general concerns expressed by applicants for review are not sufficiently particularized or supported by the facts to meet their burden on this issue.[20]

20. Moreover, local carriers and state authorities are not without means to deal with possible areas of concern caused by users seeking to interconnect to the PSTN outside of the certificated area of the normally available carrier. For instance, they may endeavor to assure that locally provided interconnections are of competitive quality. In addition, by means of locally filed tariff provisions setting forth nondiscriminatory termination charges, carriers may be able to reduce the impact on investment of cancelled facilities.[21] Moreover, our decision today does not hinder network planning. Rather, the customer rights made clear in this decision will be a factor that carriers

can assess along with existing factors in achieving acceptable network planning. Therefore, we are not persuaded that the drastic step of termination of the interconnection in question and consequent frustration of the user's choice of how best to meet its interstate communications needs is the only means by which the state can accommodate its concerns. Accordingly, we find no error in the Bureau's finding that ARCO's existing interconnection at Dallas is privately beneficial and that petitioners have failed to show that there is, or will be, public detriment sufficient to override the customer's interconnection rights in this case.

21. We have, wherever possible, tried to tailor our decisions giving effect to the customer's rights of interconnection to accommodate the particular local concerns asserted. *See* note 15, *supra*. It does not, however, appear to be possible to do so in this case without unduly impairing important federal interests. Based on the record before us, Southwestern Bell is not able to monitor and/or prevent ARCO from using its private microwave facilities to interconnect at Dallas for Plano intrastate calls, short of terminating *all* its interconnections at Dallas, including those used for purposes of originating and terminating Dallas and Plano interstate traffic.[22] As discussed above, the record does not provide adequate evidence of the public detriment necessary to support this denial of interconnection to the interstate network.

22. Furthermore, the federal interest in affirming the customer's right to interconnect in this case is substantial. If General's view were applied on a nationwide basis this could be disruptive of, and impose unacceptable burdens on, the existing communications practices and plans of many business enterprises. Companies such as ARCO utilize these networks, consisting of private and/or leased facilities, and connections to the PSTN at various locations to assure reliability, efficiency and continuity of their nationwide operations. This may require, especially in the case of some public utility companies and transportation services, the ability to access multiple local exchanges, to concentrate traffic at one originating and/or terminating location, and to reconfigure the interconnection of their microwave systems frequently, and on short notice, so that service is assured in the event of local and interstate service disruptions. These business enterprises rely upon uniform national policies regarding the use and interconnection of their private microwave systems. As ARCO has stated, the uncertainty arising from this proceeding has left it, like other private microwave system operators, unable to determine the extent to which it may tailor and use its private interstate communications network to meet the needs of its multi-point, multi-state operations.[23] For all these reasons, the decision of the Texas PUC precluding such interconnection must be preempted.

23. The parties raise several arguments, however, attempting to show that ARCO should nonetheless be denied the interconnection in question at Dallas. The Texas PUC contends that because ARCO is not prevented from interconnecting to the PSTN in Plano, ARCO's right to interconnect to the PSTN for the purpose of making interstate communications is not infringed. However, ARCO has made a business decision that, for certain of its calls to and from its Plano facilities, it has a need or requires interconnection to the network at its Dallas premises through Southwestern Bell, and has decided to use its preexisting interstate private microwave system and Dallas premises to effect that interconnection.[24] Since, as in the cases discussed *supra*, note 12, this particular interconnection of ARCO's microwave system is privately beneficial and it has not been shown to be publicly detrimental, it has a right to make this particular interconnection even though there may be other modes of interconnection that might also be privately beneficial without being publicly detrimental. Accordingly, the availability of interconnection at Plano does not affect our determination that ARCO has a federal right to exercise its choice to engage in the interconnection complained of at Dallas.

24. Petitioners also claim that the issue raised by this proceeding is a purely local matter - namely, the determination of local exchange boundaries. To the contrary, the decision of the Texas PUC, while directed at the locally tariffed offerings of Southwestern Bell, would necessarily preclude ARCO's ability to interconnect at the location in question for the purpose of interstate communications. All of the facilites used by ARCO, including its private microwave system and the DID trunks obtained from Southwestern Bell, are capable of, and are, being used for transmission of both interstate and intrastate communications; and, while the DID trunks complained of are ordered out of locally filed tariffs, these locally tariffed services are intended in part to provide access to the nationwide interstate telephone network. As discussed above, the Commission clearly has authority to preempt inconsistent state common carrier regulation where, as in the case of network interconnection policies, it is not practical to separate the interstate and intrastate communications.[25] Therefore, we reject the claim that this Commission does not have jurisdiction.[26]

25. The Commission is similarly unpersuaded by petitioners' assertion that this decision "deals a severe blow" to the states' authority to determine local exchange areas. The Bureau's Order does not permit, encourage or sanction the provision of local exchange service by carriers outside their certified service areas. While it may be true that Southwestern Bell's DID numbers and trunks are being assigned to Plano stations by the customer, and the state considers this arrangement to constitute the unauthorized provision of local exchange service, this does not alter the fact that the customer can use the facilities at issue for both interstate and intrastate traffic, and that there in no way to practically separate the two for interconnection purposes.[27] In *Heritage Village* the Commission rejected claims that Southern Bell was improperly providing exchange service in Fort Mill's certificated South Carolina exchange service area: "Heritage has an absolute right, in our view, to receive service from Southern Bell, and Southern Bell has no authority under its tariff or our rules to restrict Heritage's use of this service, even if, as here, Heritage's PBX stations in fact are located in South Carolina." *Heritage Village*, 88 FCC 2d at 1441, para. 12.[28] In our view, therefore, a user's decision to interconnect with local exchange facilities at a particular location, and its effectuation of that determination through use of its federally-licensed private microwave facilities, does not mean that state-determined local exchange boundaries are invalidated.[29]

26. Finally, the petitioning parties also argue that the Bureau's application of the principles stated in *Heritage Village* was mistaken. We do not agree. In *Heritage Village* the customer's communications system consisted of a PBX, individual stations and intra-system wiring connecting the individual stations to the PBX, all of which were provided by the customer, and served its entire location,

part of which was in North Carolina and part in South Carolina. 88 FCC 2d 1437, para. 2. The customer chose to connect its PBX, and hence all of its communications system, to the facilities of the carrier whose certificated exchange area was in North Carolina. Thus, under this arrangement the customer stations in South Carolina were connected to the PSTN via the interconnection to the carrier in North Carolina. In the case before the Commission today the customer, who is located in both exchanges at issue, has chosen to connect its customer stations in Plano for non-local exchange off-ARCOnet traffic to the PSTN at Dallas. As in *Heritage Village*, this is by means of registered terminal equipment at the network interface, which in turn is connected to a customer-provided communications system that connects its customer stations to the PSTN, including those stations in Plano.[30] While in this case ARCO is using microwave facilities licensed by this Commission instead of intra-system wiring to connect its stations to the PSTN via the registered equipment, and there are two customer locations rather than a single campus-type location, we are not convinced that these differences dictate a different result than in *Heritage Village*.[31] We believe our decision today is consistent with, and supported by, *Heritage Village*. Accordingly, we reject General's arguments on this point.

27. Accordingly, IT IS ORDERED, that the Applications for Review filed by General Telephone Company of the Southwest, the State of Texas, the United States Telephone Association and the National Association of Regulatory Utility Commissioners ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Walker H. Feaster III
Acting Secretary

FOOTNOTES

[1] During the course of this proceeding the parties and commenters have submitted numerous motions for acceptance of supplementary pleadings and oppositions and/or responses thereto. While not all these pleadings are contemplated by our rules, we have considered the arguments of all the parties. By doing so, all interested parties have been given an opportunity to comment, and the Commission has a fuller record upon which to base its decision. *See Associated Press*, 72 FCC 2d 760, 762-63 (1979); *Columbia Broadcasting Systems, Inc.*, 46 FCC 2d 903-06 (1974). In addition, *ex parte* presentations have been made. *See* 47 C.F.R. § 1.1206 *et seq.* All these pleadings, and written summaries of permissible *ex parte* presentations, are associated with the public record of this proceeding and are available for inspection and copying in the Domestic Facilities Division Public Reference Room, Room 6220, 2025 M. Street, N.W., Washington, D.C. 20554, (202) 634-1512.

[2] It requested from Southwestern Bell, and was provided, 36 DID trunks, 45 two-way central office trunks, and 2000 DID numbers. Comments of Southwestern Bell, filed November 14, 1983, at 2. It informed General that it would not need all of the 73 trunk circuits and 1600 DID numbers General was providing. ARCO Petition for Emergency Relief and Declaratory Ruling, filed October 26, 1983, at 13. In fact, however, pending the outcome of this proceeding, ARCO continues to obtain and pay for the pre-level of interconnection facilities from General. ARCO claims that under this status quo arrangement it had spent some 350,000 for facilities of General Telephone for which ARCO had no use. ARCO Urgent Request for Commission Action (ARCO Urgent Request), filed July 1, 1987, at 2-3.

[3] Even before these additional trunks and DID numbers were ordered, interconnection of the Plano lab to the PSTN in Dallas through the use of ARCO's private microwave link and Dallas PBX had been possible. *See* General's Reply to ARCO's Urgent Request at 4-5.

[4] Although General claims that under this new service arrangement "not even intra-Plano calls to or from the research center will require the local services of General," General's Reply to ARCO's Urgent Request, at 6, ARCO has stated that, for calls to and from off-ARCOnet locations in Plano, it will retain connections provided by General for local exchange service in Plano regardless of routing of other calls through Dallas. ARCO Supplemental Comments, filed July 17, 1987, at 4; ARCO Urgent Request at 6. *See also* ARCO Petition for Emergency Relief and Declaratory Ruling, filed October 26, 1983, at 13. In addition, ARCO states that it will retain private line services in Plano used to connect its Plano laboratory with other ARCO offices in Plano. It states that it currently leases 58 private lines from General in Plano for this purpose. *Id.*

[5] *See* letter from the Chief, Common Carrier Bureau to Jose Varela, Esq., General Counsel's Office, Public Utility Commission of Texas, dated June 18, 1984.

[6] Pursuant to proceedings in a Texas state court, the PUC ruling has been stayed pending outcome of this Commission's decision on review. ARCO Urgent Request at 4.

[7] *Heritage Village Church and Missionary Fellowship, Inc.*, 85 F.C.C. 2d 787 (1981) (Interim Order), 88 F.C.C. 2d 1436 (1982) (Final Order), *aff' d sub nom. Fort Mill Telephone Co. v. FCC*, 719 F.2d 89 (4th Cir. 1983) (*Heritage Village*). *Heritage Village* involved a single customer location which crossed state boundaries between two local telephone companies' exchange service areas. That customer, Heritage Village, chose to locate a PBX serving its entire operation in North Carolina and to interconnect there with Southern Bell, even though the bulk of its customer-provided PBX stations were located in the exchange area of the Fort Mill Telephone Company in South Carolina. The Commission nullified a South Carolina Public Service Commission order that required Southern Bell Telephone Company to discontinue providing service to Heritage Village through interconnections provided in North Carolina so that Fort Mill Telephone Company could provide connections to Heritage Village in South Carolina.

[8] Likewise, Dobson urges that the Commission discuss and recognize the nationwide impact of the Bureau's decision. It claims actions such as ARCO's are especially harmful to small telephone companies.

[9] General's Reply to ARCO Urgent Request at 4-5.

[10] It states ARCO could thus reassign DID numbers from Dallas employees to Plano employees or, without the use of DID facilities, use PBX trunks from Dallas with a switchboard operator to transfer calls to and from its Plano employees. Opposition of Southwestern Bell to Applications for Review, filed January 28, 1986 at 8 n.8.

[11] *Hush - A - Phone Corp.*, 20 FCC 391 (1955), *aff'd Hush - A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956); *Carterfone*, 13 FCC 2d 420, *recon. denied*, 14 FCC 2d 571 (1968).

[12] 47 U.S.C. Section 201; *See American Telephone and Telegraph Company, Interconnections with Private Interstate Communications Systems*, 71 FCC 2d 1 (1979) (*ARINC*). The *ARINC* case involved a challenge to a local tariff provision which in effect restricted the customer premises locations at which local exchange service would be made available. This provision was applied to

deny to a customer facilities he requested to connect his private interstate communications system (consisting of microwave and private line links) to local exchange facilities. The local exchange facilities were to be used, as in this case, as an integral part of a private interstate communications system. In *ARINC*, the customer wanted to set up the equivalent of an FX line through a combination of local exchange service and its own private system. The Commission invalidated those local tariff restrictions as an impermissible infringement on the customer's freedom to have reasonable access to local exchange service for effective use of his private interstate microwave communications system. *See also AT & T Premises Ruling*, 60 FCC 2d 939 (1976). In *AT & T Premises Ruling*, the Commission invalidated AT&T tariff restrictions which generally limited the connection of AT&T private lines with communications systems provided by a customer or another carrier to the premises at which the customer had a regular and continuing need to originate and terminate calls. The Commission found that such restrictions, which prevented a customer from obtaining termination of AT&T's private line service at non-customer premises, were inconsistent with well-established interconnection precedent. The Commission concluded that so limiting the manner in which a customer or other carrier could interconnect its microwave communications systems with AT&T's private line services was an unjustified infringement on customers' freedom to choose means by which they can use the telephone network to best satisfy their communications needs. *See also* 47 C.F.R. § 94.13 which provides for the interconnection of private operational-fixed microwave stations to the facilities of common carriers subject to applicable tariffs; *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 721-22 (1978).

[13] *See AT & T Premises Ruling, supra*, at 943.

[14] *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert denied*, 429 U.S. 1027 (1976) (NCUC I). *North Carolina Utilities Commission v. FCC (NCUC II)*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 34 U.S. 874 (1979). In the *NCUC* cases the court found that where the FCC acted within its authority to permit subscribers to provide their own telephones, the Commission properly preempted inconsistent state regulations prohibiting subscribers from connecting their own telephones capable of use in interstate service. The court recognized that because "separation of terminal equipment used exclusively for local communication is a practical and economic impossibility," the proposed state rules, if allowed to stand, would have negated the federal tariff. *NCUC II* at 1043. *See also* discussion of *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890 (1986), at note 25, *infra*.

[15] This principle of federal supremacy in interconnection matters does not, however, signify that states have no legitimate interests in such issues. To the contrary, it merely takes into account the Act's mandate that this Commission make available a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges," 47 U.S.C. § 151, and the fact that interconnection is an area in which it is generally impractical, if not impossible, to have conflicting regulatory regimes apply and still meet these statutory goals. Recognizing the propriety and legitimacy of state involvement in interconnection and related matters when conflicts do not exist between state and federal policies, we have acknowledged the states' role in several situations that differ factually from that of this proceeding. For example, in *Request for Declaratory Ruling Re State Regulation of Shared Tenant Services*, FCC 86-25 (released Feb. 14, 1986), we found that while our existing interconnection decisions require local exchange carriers to interconnect with PBXs shared among multiple users or employed by third-party operators to provide PBX service to multiple users, these decisions do not permit the resale of local service in violation of state restrictions. Similarly, in *Registration of Coin Operated Telephones*, 49 Fed. Reg. 27763 (1984), we found that states may establish tariff requirements governing the features or markings permitted or required on instrument-implemented coin telephones for intrastate use. We noted, however, that any state restriction affecting the use of registered coin telephones that unreasonably infringes on a customer's right to interconnect with the network in a way that is privately beneficial and not publicly detrimental will be reviewable by this Commission. In *Universal Payphone*, FCC 85-222 (released May 6, 1985), we found that states may regulate the use of customer-owned coin and credit card telephones (COCTs) for intrastate and local communications, but may not prohibit the interconnection of such devices for interstate uses. Applying this holding in *Paytel Systems, Inc.*, Mimeo 2583 (released Feb. 14, 1986), the Chief of the Common Carrier Bureau declined to find unlawful the regulations of two state commissions regarding permissible locations for COCTs used for intrastate and local calling. *See also Petitions of MCI and GTE Sprint Regarding the Validity of CDPUC Decisions Relating to Unauthorized Intrastate Traffic*, 1 FCC Rcd 270 (1986), at para. 27. In that case, the Commission affirmed the right of the Connecticut legislature and PUC to require compensation to the intrastate jurisdiction for unauthorized intrastate calls completed over interexchange carrier networks. In declining to preempt the state scheme, the Commission relied in part on the fact that the plan did not require the blocking of unauthorized intrastate calls, which necessarily would have entailed the impermissible blocking of interstate calls. The Commission found that the Connecticut plan, which provided for billing unauthorized intrastate traffic, could be implemented without impermissibly affecting the transmission of interstate calls.

[16] *See* para. 16, *supra*, and discussion of *Louisiana Public Service Commission v. FCC*, at note 25, *infra*.

[17] *See supra* para. 14.

[18] The Texas PUC itself found only the possibility of General's investment of 311,612 in facilities used by ARCO being stranded temporarily. Texas PUC Order, Docket 5264, July 8, 1985, Findings of Fact Nos. 17 & 21, p. 4. *See also Bypass of the Public Switched Network*, CC Docket No. 78-72, FCC 84-635 (released January 18, 1985), p. 10 n.15.

[19] We previously have rejected similar arguments by carriers opposed to the concept of private telecommunications facilities and systems. *See e. g., Allocation of Microwave Frequencies Above 890 Mc.*, 27 FCC 359, *recon.* 29 FCC 825 (1960) where existing common carriers argued that use of private microwave systems would reduce revenues and impede their ability to serve the public. We consistently have found that private microwave facilities and systems benefit individual users by allowing them to tailor their systems to meet their needs and also benefit the general public by speeding innovation and giving carriers an incentive to be sensitive to customer needs. *See First Report and Order*, Docket 20003, 61 FCC 2d 766 (1976); *Second Report and Order*, Docket 20003, 75 FCC 2d 506 (1980); *First Report and Order*, Docket 83-426, 50 Fed. Reg. 13338 (1985), paras. 59-61.

[20] *See* Bureau Order at para. 17. While we agree with the arguments made by General (at pages 7-11 of its July 17, 1987 Reply to Arco's Urgent Request) that in order to show an economic impact constituting public detriment, the carrier need not go so far as to show a probability of financial collapse, we believe that it is nonetheless necessary for such harms as are alleged to be factually supported and otherwise persuasive. If, as in this case, a carrier's loss of some business due to a customer's decision to interconnect some of its traffic to the PSTN at another location can override that customer's interconnection decision, without other demonstrated significant consequences to the carrier, then carriers would be able to prevent almost any customer choice of

interconnection, other than the one preferred by the carrier. Such a result, we believe, would eviscerate this Commission's federal interconnection policies.

[21] States remain free, of course, to establish rates for intrastate traffic. The instant order in no way precludes the state from developing reasonable and appropriate billing or revenue arrangements between General and Southwestern Bell to allocate the intrastate costs and revenues associated with this traffic. Here, however, the state order would terminate all communications over the facilities in question, interstate as well as intrastate.

[22] *See* Southwestern Bell Opposition to Application for Review, at 7-9 and *supra* para. 14.

[23] ARCO Urgent Request at ii-iii. *See also generally* Supplemental Comments of UTC filed July 17, 1987; summary of ex parte presentation filed August 14, 1987 by the Association of American Railroads.

[24] No party has disputed on review, and we find no error in, the Bureau's assessment in its Order at para. 19, that the service arrangements at issue in this proceeding are privately beneficial to ARCO.

[25] See supra para. 17. The Supreme Court's decision in *Louisiana Public Service Commission* v. *FCC,* 106 S. Ct. 1890 (1986) fully supports this conclusion. In that case the court held that this agency had exceeded its authority concerning prescription of certain intrastate depreciation charges. At the same time, however, the Court cited, with approval, the *NCUC* line of decisions in which the FCC was upheld in preempting inconsistent state regulations prohibiting subscribers from connecting their own telephones. 106 S. Ct. at 1902, n. 4. The Court indicated that this preemption was justified because, given the dual jurisdictional use of terminal equipment, it was not possible to separate the regulation of the interconnection of this equipment into interstate and intrastate components. Id. at 1902 n. 4.

[26] The Commission is also unpersuaded by General's reliance on *People of the State of California* v. *FCC,* 798 F.2d 1515 (D.C. Cir., 1986) in which the court invalidated the Commission's preemption of state regulation of entry of certain purely intrastate radio common carrier communications services provided over FM broadcast subcarrier frequencies. That case did not involve the user's right to connect to the interstate network, nor did it seek to question, refine, or reevaluate that right.

[27] *See* cases cited at note 11, *supra; see also California* v. *FCC,* 567 F.2d 84 (D.C. Cir. 1977). As a result of this inseverability, the point of network interconnection of the subscriber's equipment for interstate service may also serve as such for some of that customer's intrastate services.

[28] In any event, as discussed above, it does not appear that ARCO will rely on the disputed connections provided by Southwestern Bell for local calling from the Plano facilities to the Plano area within General's certificated service. As the Bureau Order, n. 18, observed, and ARCO has repeatedly stated in this proceeding, *see supra* note 4, it intends to retain service from General for off-ARCOnet communications between the Plano lab and points in Plano. Furthermore, even if any intra-Plano calls were routed through Dallas, and back to Plano, the EAS service arrangement approved by the state, which avoids the imposition of any toll charges, contributes to the economic feasibility of such circuitous routing. To the extent that the existence of local EAS service between Dallas and Plano may influence ARCO's choice of routing arrangements for its traffic -- by making one routing more, or equally, economically feasible or desirable than another -- the Texas PUC is free to use its control over intrastate EAS tariffs to create economic incentives or disincentives to the establishment of certain routing arrangements within the state.

[29] General has brought to the Commission's attention two recent state actions, *(Lincoln Telephone Company,* Application No. 634, (Neb. P.S.C. October 7, 1986) and Citizens Coop Gin v. General Telephone, No. 3-86-007-CV (3rd Dist., April 15, 1987)), arguing they demonstrate potentially widespread attempts by customers to obtain service from exchange companies outside the customer's exchange area. However, we do not believe that the existence of these two cases establishes that there will be a significant incidence of customers endeavoring to connect a premises to the PSTN outside the certificated exchange area in which the premises is located.

[30] See ARCO Petition for Emergency Relief and Declaratory Ruling, p. 12.

[31] Indeed, in *Heritage Village* the Commission cited as support its affirmation in the *ARINC* decision, *supra* note 12, of "subscribers' rights of connecting private microwave radio facilities with local telephone facilities, notwithstanding that such radio facilities might cross telephone companies' service boundaries . . . *"Heritage Village,"* 88 FCC 2d at 1441.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Comark Cable Fund III, d/b/a
CCI CABLEVISION,
Complainant,

v. File No. E-84-1

NORTHWESTERN INDIANA
TELEPHONE COMPANY,
INC.,

and

Northwestern Indiana CATV, Inc. d/b/a
NORTHWEST INDIANA
CABLEVISION,

successor to

Rhys Mussman d/b/a
NORTHWESTERN INDIANA
CABLEVISION,
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1988; Released: May 27, 1988

By the Commission:

1. Pending before the Commission is a remand order by the United States Court of Appeals for the District of Columbia Circuit (the Court), decided July 31, 1987, in the subject proceeding.[1] The *Court's Order* requires the Commission to clarify our conclusion that Northwestern Indiana Telephone Company, Inc. (NITCO) and Northwest Indiana CATV, Inc. (Northwest) violated our telephone/cable television cross-ownership rules.[2] This order constitutes the Commission's compliance with the Court's mandate.

I. BACKGROUND

A. *The Commission's Orders*

2. Our previous orders in this matter [3] required NITCO and Northwest (defendants) and Northwest's predecessor, Rhys Mussman d/b/a Northwestern Indiana Cablevision, to divest cable television distribution facilities constructed within NITCO's telephone service area without our prior approval. These *Orders* found defendants had committed substantial violations of section 63.54 of our Rules[4] and section 214(a) of the Communications Act[5] based on, *inter alia*, our finding that such construction by NITCO had been on behalf of a cable television company which we found had been affiliated with NITCO. Defendants had been cautioned as early as April of 1984 that any further construction and operation of cable television facilities by Northwest within NITCO's telephone service area without prior Commission authorization would be at defendants' peril and render them subject to sanctions, including divestiture.[6] Nevertheless, defendants continued to construct and operate cable television facilities in three separate communities within NITCO's telephone service area without applying for or receiving the requisite FCC authorization pursuant to Part 63 of our Rules.[7]

B. *The Court's Order*

3. In its decision, the Court has remanded the proceeding to us for a further explanation in a relatively narrow area. It was concerned that our finding that defendants were affiliated might have been based in part on criteria that appeared inconsistent with our Rules and precedent. It concluded that further elucidation was necessary.[8] In this regard, the Court also found that the lease of pole space, by itself, to an unaffiliated cable operator was contemplated and permissible under our Rules.[9] Accordingly, the Court was troubled by language in our order denying reconsideration that appeared to suggest that the sole act of renting pole space converted the lessee into an affiliate of the lessor.[10] Further, in light of our decision in *The Chesapeake and Potomac Co.*, 57 Rad. Reg. 2d 1003 (1985) (*C & P*), the Court found that the boundaries of the "carrier-user" exception to our telephone/cable television cross-ownership prohibitions needed to be explained.[11] Lastly, the Court raised questions regarding our section 214 certification process. Because it is clear that a certificate would be required if NITCO and Northwest are found to be affiliated, the Court stated that if, on remand, the Commission determines the parties to be affiliated, the issue may not need to be further addressed.[12] Accordingly, the case was remanded for an explanation of our conclusions in these limited respects.[13]

II. DISCUSSION

A. *The Affiliation Standard Under Section 63.54*

4. Section 63.54(a) precludes a telephone common carrier from engaging in cable television service in its telephone service area through an affiliate. The first note to section 63.54 states that the term "affiliate" "bars any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship."[14] Section 63.54(b) precludes a telephone common carrier from providing space on its poles to an affiliate engaged in the business of providing cable television service.

5. In the instant proceeding, we made a determination of affiliation based on all of the facts of record taken together. Specifically, we listed numerous "transactions" which indicated such an affiliation existed. In our order denying reconsideration, we reiterated four of the transactions emphasized in our original decision and added three more to the list, including NITCO's lease of telephone pole space to Northwest. Although, as noted by the Court, our first opinion based the determination of affiliation on all of the facts taken together, the opinion denying reconsideration stated that "each of [the seven listed relationships] was and continues to be prohibited by Section 63.54." 103 FCC 2d at 602. This statement requires

elucidation. It was not our intention to state that the NITCO pole leases to Northwest or Rhys Mussman are by themselves prohibited under section 63.54(a) or that the simple leasing of pole space constitutes indicia of an affiliation. Rather, we intended to conclude that the lease of pole space was a prohibited relationship solely because of our finding of affiliation for other reasons.[15] In order to clarify our position in this regard, we will briefly summarize the evidence upon which we determined that a prohibited affiliation existed.

6. As the Court noted, these transactions included: Robert Mussman's lease of office space to Northwest; NITCO's sublease of land used as the site of Northwest's antennas and other cable equipment;[16] a paid consulting agreement between Rhys Mussman and NITCO; Robert Mussman's personal guarantee of 450,000 in bank loans made to Northwest; Robert Mussman's personal guarantee of Rhys Mussman's agreement to indemnify one of the localities served by Northwest against costs arising from litigation involving Northwest; and Northwest's use of NITCO's post office box and mailing address;[17] and the particular oral private contractual agreements between defendants for construction and maintenance with respect to Northwest's cable systems in three Indiana communities.[18]

7. In addition to these clear indicia that an "affiliation" existed between the two companies, the record indicates other transactions and courses of dealings which support this conclusion. For example: a salaried employee of the telephone company (the Executive Vice President) was simultaneously doing business (as an individual proprietorship) as the cable company;[19] that same employee was responsible for negotiating pole attachment agreements on behalf of the telephone company with cable companies with which he was competing for cable franchises in communities within the telephone company's service area;[20] all contractual arrangements between the companies, involving hundreds of thousands of dollars, were oral;[21] an oral consulting arrangement between the telephone company and the chief executive officer of the cable company was not reduced to writing;[22] and the cable company's CEO represented to city franchising officials that he was the Executive Vice President of his father's telephone company and further represented[23] that his father was Secretary-Treasurer of his cable company.[24] For all these reasons, we confirm and clarify our earlier view that an affiliation did exist, independent of the fact that the cable company leased pole space from the telephone company.

8. We now turn to the question whether the transactions are exempt because they fall within the carrier-user relationship. The Court said that, in light of *C & P* and *Ohio Bell Telephone Co.*, 1 FCC Rcd 942 (1986) (*Ohio Bell*), it could not clearly determine the boundaries of the carrier-user exception.[25] We therefore take this opportunity to clarify our position in this regard. Under existing law, an essential element of common carriage is an entity's holding itself out to serve all customers indiscriminately.[26] The key to the carrier-user exemption is whether the carrier is providing facilities as part of its services as a common carrier and whether such services are generally available. Thus, the "carrier-user relationship" exception to section 63.54 of our Rules contemplates transactions that entail a general offer to provide on an indiscriminate basis substantially the same service or services to any and all similarly-situated companies or members of the public.

9. In *C&P*, we authorized the carrier to construct and maintain channel distribution facilities for use by a franchised cable television customer pursuant to a proposed arrangement which would allow the cable customer to enjoy attributes of ownership in the facilities although legal title would be retained by the carrier. The *Ohio Bell* decision authorized a carrier's proposal to construct and maintain channel distribution facilities which (except for the "hub" portions physically located on the carrier's premises) were to be sold to the cable customer. The cable customer would be obligated to make periodic payments for maintenance of the lines and use of the "hub" facilities. In both the *C&P* and *Ohio Bell* cases, the construction and maintenance of the cable distribution facilities were available generally to the public. That fact was critical to our determination, in each of these cases, that the "carrier-user relationship" applied.

10. Here, in contrast, neither NITCO nor Northwest ever even argued that they had, or ever contemplated having, a common carrier-user relationship and indeed it is apparent that they had no such relationship. Their position has always been that NITCO's relationship with Northwest was not as a common carrier but rather as a private contractor. Their conduct supports this. Unlike the carriers in *C & P* and *Ohio Bell*, NITCO did not hold itself out to others under comparable terms and conditions. To the contrary, competitors or potential competitors of Northwest did not have the opportunity to enter into similar agreements with NITCO on terms and conditions that would not be discriminatory or otherwise inconsistent with the regulatory regime of sections 201 through 205 of the Act. In fact, Northwest faced a competing cable television company that was operating in the area, which had not been offered the same arrangement provided to Northwest.[27] Thus, the relationship fostered by NITCO was not an indifferent holding out of service required for coverage under the carrier-user relationship.[28]

11. This proceeding is distinguishable from *C & P* for additional reasons. Unlike *C & P*, where the telephone and cable companies were independent entities before they entered into the proposed tariff services there involved, as explained above, the two companies here were affiliated independently of the pole leasing arrangements.[29] Rhys Mussman simultaneously wore both his telephone company and his cable company hats. As Executive Vice President of NITCO, he had responsibility for negotiating agreements with cable television companies seeking to lease space on NITCO's poles. As Rhys Mussman d/b/a Northwestern Indiana Cablevision, he sought authority to construct cable systems in two Indiana communities where a competing cable operator also was seeking such authority and to lease space on NITCO's poles in those communities. His father, the president, chairman and majority stockholder of NITCO, also was directly involved in his son's cable venture by guaranteeing financial and legal obligations of Rhys' cable company.[30]

12. In sum, unlike other cases involving a carrier's public holding out to construct and maintain cable television distribution facilities on a nondiscriminatory basis,[31] NITCO made no such indifferent holding out to other cable television entrepreneurs. It is NITCO's failure to deal with Northwest on common carrier terms that causes us to conclude that there was no carrier-user relationship. Because of undisputed direct and indirect financial and business relationships between defendants determined on the record, quite apart from their pole attachment lease

arrangements, we concluded that defendants were affiliated companies within the meaning of our rules and that divestiture of the unlawfully constructed cable facilities was warranted under all of the circumstances. In addition, for the reasons stated above, we find that the defendants' relationship did not fall within the carrier-user exception. Accordingly, *C&P* and *Ohio Bell* are not controlling in this case.

B. ***The Necessity for Section 214 Certification***

13. The final issue before us is whether NITCO violated section 214 of the Act by constructing cable television distribution facilities for Northwest. NITCO contends that section 214 does not apply to it because it has engaged in interstate communication only as a "connecting carrier," *i.e.*, solely through physical connection with the facilities of another common carrier, and therefore is not subject to section 214. In adopting our cross-ownership rules, we stated that cable television service offered by an affiliate of a telephone company would be considered to be cable television operations by the telephone company "without any further necessity of piercing the corporate veil" to show that the companies were under common control.[32] Thus, when NITCO constructed cable lines to be used by its affiliate, Northwest, for transmitting off-the-air broadcast television signals, which is interstate communication under section 2(a) of the Act, defendants became engaged in interstate communication in a manner other than "solely through physical connection with the facilities of another carrier. . . ." and thus no longer remained a "connecting carrier" that is exempt from section 214(a) of the Act under section 2(b)(2) of the Act.[33]

14. With respect to interstate lines *outside* of carrier's exchange telephone service area, we have granted exchange telephone companies blanket section 214 authority to construct lines for their cable television services, their noncommon carrier services, or when the lines are to be sold to an unaffiliated party.[34] We similarly have granted blanket section 214 authority to construct interstate lines to nondominant carriers.[35] However, NITCO, as a local exchange telephone carrier, is a dominant carrier and thus was not exempt under section 63.08(b) from the need to file for and obtain prior section 214 authorization to construct cable television lines within its local telephone service area.[36]

15. In view of the foregoing discussion, because defendants do not deny that they would have been required to file for authorization pursuant to section 214 of the Act and section 63.54 of our Rules if they are properly determined to have been affiliates,[37] it is not necessary to reach the issue whether NITCO would have needed a section 214 certificate[38] if defendants were not affiliates within the meaning of our telephone/cable television cross-ownership rules.[39]

16. Accordingly, IT IS ORDERED that the findings and conclusions in our *Orders*, as further explained and clarified herein, ARE HEREBY REAFFIRMED.[40]

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] Northwestern Indiana Telephone Co. v. FCC, 824 F.2d 1205 (D. C. Cir. 1987) (the *Court's Order*).

[2] 47 C.F.R. §§ 63.54-63.58.

[3] Comark Cable Fund III, 100 FCC 2d 1244, *recon. denied*, 103 FCC 2d 600, *conditionally stayed*, 104 FCC 2d 451 (1985) (*Orders*). The conditional stay was automatically terminated upon the refusal of the Court to issue a stay of our *Orders*. Northwestern Indiana Telephone Co. v. FCC, No. 85-1542 (D.C. Cir. July 11, 1986) (*per curiam*).

[4] 47 C.F.R. § 63.54 provides in pertinent part as follows:

APPLICATIONS OF TELEPHONE COMMON CARRIERS TO CONSTRUCT AND/OR OPERATE CABLE TELEVISION CHANNEL FACILITIES IN THEIR TELEPHONE SERVICES AREAS

§ 63.54 Facilities for provision of video programming by a telephone common carrier in its telephone service area.

(a) No telephone common carrier subject in whole or in part to the Communications Act of 1934 shall engage in the provision of video programming to the viewing public in its telephone service area, either directly, or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the telephone common carrier.

(b) No telephone common carrier subject in whole or in part to the Communications Act of 1934 shall provide channels of communicationsor pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such telephone common carrier, where such facilities or arrangements are to be used for, or in connection with, the provisions of video programming to the viewing public in the telephone service area of the telephone common carrier.

Note 1: (a) As used above, the terms "control" and "affiliate" bar any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship.

(b) Examples of situations in which a carrier and its customer will be deemed to be controlled or having a relationship include the following, among others: Where one is the debtor or creditor of the other (except with respect to charges for communication services); where they have a common officer, director, or other employee at the management level; where there is any element of ownership or other financial interest by one in the other; and where any party has a financial interest in both. . . .

[5] 47 U.S.C. § 214(a). *See* note 38, *infra*.

[6] *See* 100 FCC 2d at 1253 n.37.

[7] Part 63 of our Rules, 47 C.F.R. § 63.01, *et seq.*, implements section 214 of the Act as well as our telephone/cable television cross-ownership policy decision, Section 214 Certificates, 21 FCC 2d 307 (1970), *aff'd sub nom.* General Telephone of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971).

[8] *Court's Order*, 824 F.2d at 1206-07, 1210.

[9] *Id.* at 1209.

[10] *Id.*

[11] *Id.* at 1210.

[12] *Id.* at 1210-11.

[13] Although the Court's mandate appeared to vacate our previous *Orders*, the Court granted our request for clarification of the mandate to make clear that no vacation of our *Orders* was contemplated by the Court, and amended the mandate accordingly. Northwestern Indiana Telephone Co. v. FCC, No. 85-1542 (D.C. Cir. Nov. 17, 1987).

[14] 47 C.F.R. § 63.54 n.1(a).

[15] *See , e. g.*, our *Orders*, 100 FCC 2d at 1251, 103 FCC 2d 613 at n.29, and para. 11, *infra*.

[16] Robert Mussman now directly leases such property to Northwest. It appears that Northwest also proposed to locate a microwave radio receive site on property owned by or leased to NITCO directly behind its DeMotte central office. *See Orders*, 103 FCC 2d at 606 n.13.

[17] *Court's Order*, 824 F.2d at 1207.

[18] *See Orders*, 103 FCC 2d at 602-03.

[19] *Id.*, 100 FCC 2d at 1251.

[20] *Id.*, 103 FCC 2d at 612.

[21] Some of the agreements, although not all, were reduced to writing only after a formal complaint had been filed. *Id.*, 100 FCC 2d at 1248. The fact that the contracts were oral, rather than written, is an important indication that the relationships were not the sort of arms- length transactions that can be expected of truly independent entities.

[22] *Id.*

[23] The defendants admit that this representation was made, but they claim that it was false.

[24] *Id.*, 100 FCC 2d at 1251.

[25] *Court's Order*, 824 F.2d at 1210.

[26] National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 999 (1976). *See also* Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238, 1255-57 (1982), *aff'd sub nom.* Wold Communications v. F.C.C., 735 F.2d 1468 (D.C. Cir. 1984).

[27] *Orders*, 103 FCC 2d at 611. Indeed, NITCO did not offer arrangements to a competitor of Northwest on the same oral terms and conditions extended to Northwest. Such conduct raised serious anticompetitive concerns because Rhys Mussman, the person responsible for negotiating pole attachment agreements on behalf of NITCO, was himself planning to lease space on NITCO's poles and to construct Northwest's cable television systems in the same communities.

[28] Even though only one company had been awarded a franchise or authority to engage in cable television operations in the District of Columbia in *C&P* and in Cleveland in *Ohio Bell*, the carriers were obligated to indiscriminately hold themselves out to serve all similarly-situated customers under the same terms and conditions of service. If more than one cable company is franchised in the service areas of those cases, the Communications Act would require the telephone companies to permit those other cable companies to obtain those carriers' services.

[29] Here, we are concerned about the anticompetitive impact of Rhys Mussman negotiating with a competing cable company for pole space on behalf of the telephone company at the same time he was seeking franchises for his own cable systems. *Orders*, 103 FCC 2d at 611-612.

[30] The Court asked for an explanation why, in light of the finding in *C & P* that the proposed transfer of certain attributes of ownership in channel distribution facilities to the cable company fell within the carrier-user exception, "transfer of ownership rights *in toto* -- as occurred in the present case -- is treated differently." 824 F.2d at 1210 (footnote omitted). As clarified above, the availability of the carrier-user exception in a particular situation depends on whether there is an indifferent holding out, and not on whether a telephone company leases or sells the facilities that it proposes to construct for use by a cable television operator. What distinguishes the instant case from *C&P* and *Ohio Bell* is that in those cases the telephone company and the cable company did have a carrier-user relationship for which there is an explicit exemption from the cross-ownership bar in section 63.54(a). *See* para. 9, *supra*.

[31] *See, e.g., C&P*, 57 Rad. Reg. 2d at 1006 and 1008 (even though the District of Columbia decided to authorize only one cable operator, the carrier was willing to provide equivalent facilities to others on like terms, made similar offers to others as it had to the city's franchisee, and also complied with our rules relating to the availability of pole space); The Chesapeake and Potomac Telephone Company Tariff F.C.C. No. 10, effective October 1, 1986 (public offering of broadband transport facilities).

[32] Section 214 Certificates, 22 FCC 2d at 751 (1970). *See Orders*, 100 FCC 2d at 1255; 103 FCC 2d at 611, n.24.

[33] *See* 47 U.S.C. §§ 153(u), 152(b)(2).

[34] Section 63.08(a) of our Rules provides as follows:

> An exchange telephone common carrier or its affiliate is not required to file for authority pursuant to 47 U.S.C. 214 and 47 C.F.R. 63.10 to provide lines, or for existing lines, *outside* of the exchange telephone service area of that carrier and any of its affiliates when the lines are (i) for its own cable television service; (ii) for its noncommon carrier services; or (iii) sold to an unaffiliated party. "Affiliate" is defined as in 47 C.F.R. 63.54. (emphasis added)

[35] Section 63.08(b) of our Rules provides as follows:

> (b) If a nondominant common carrier and its affiliates are not affiliated with an exchange telephone common carrier, the nondominant carrier or its affiliate is not required to file for authority pursuant to 47 U.S.C. 214 and 47 C.F.R. 63.01 to provide lines, or for existing lines, of the types described in paragraph (a) of this section between any domestic points. "Affiliate" is defined as in 47 C.F.R. 63.54 and "nondominant" is defined as in 47 C.F.R. 61.15a [sic].

The reference to the definition of "nondominant" should be to 47 C.F.R. 61.12(e).

[36] We have determined that franchised exchange telephone companies possess control of essential facilities and will continue to be treated as dominant carriers for regulatory purposes. Competitive Common Carrier Rule Making, 85 FCC 2d 1, 11, 23-24 (1980). *See also* 47 C.F.R. § 61.12(c) where a dominant carrier is defined as a carrier found by the Commission to have market power (*i.e.*, power to control prices).

[37] *See, e.g.*, Letter from Russell D. Lukaš to Chief, Common Carrier Bureau, at 2 (Feb. 7, 1986) (reproduced at Appendix to the Commission's Motion for Expedited Consideration of Emergency Motion for Stay filed with the Court on July 11, 1986, at 16); 47 C.F.R. § 63.54 at note 1(a). Another distinguishing factor between the instant case and *C&P* and *Ohio Bell* was defendants' failure to file an appropriate section 214 application or request for waiver, which would have served as a vehicle for examining NITCO's involvement in Rhys Mussman's cable television operations and as a means of ensuring compliance with the Act and our policies under Part 63 of the Rules. *See* note 39, *infra*.

[38] Section 214(a) provides, in pertinent part, that:

> [n]o carrier shall undertake the construction of a new line or of an extension of any line . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such additional or extended line. . . . As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels. . . .

[39] *See Court's Order*, 824 F.2d at 1211. As previously noted (*see* note 7, *supra*), Part 63 of our Rules implements not only section 214(a) of the Act, but also our telephone/cable television cross-ownership policies and rules. NITCO's failure to file the required application pursuant to section 214(a) precluded not only the timely exercise of our statutory right and obligation to pass upon a carrier's construction of interstate lines, but also deprived us of the vehicle by which we examine whether proposed construction by a telephone company of cable television facilities within its telephone service area would comply with our cross-ownership rules and policies. It was only after a competitor of Northwest filed a complaint alleging that defendants were violating sections 214(a) and 202(a) of the Act and section 63.54 of our Rules that we became aware of NITCO's unauthorized construction of interstate lines within its telephone service area.

[40] We have not addressed defendants' pleading entitled "Petition to Terminate Proceedings" (filed September 4, 1987). The *Court's Order* did not require us to reopen the record to accept additional comments or argument. *Court's* Order, 824 F.2d at 1210 n.8. Rather, the Court merely remanded the case for the limited purposes discussed herein. We find that defendants' attempt to inject new arguments at this late date as well as reargue positions already fully considered before the record was closed would not be in the public interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RAM COMMUNICATIONS OF MICHIGAN, INC.

File No. 21013-CD-P/ML-03-87

For authority to establish additional facilities for Public Land Mobile Station KQD303 on frequency 152.24 MHz at St. Clair Shores, Warren, and Trenton, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1988; Released: May 27, 1988

By the Chief, Mobile Services Division:

1. Before us is an "informal request for Commission action" filed by Port City Communication, Inc. (Port City) to dismiss or deny the captioned application of RAM Communications of Michigan, Inc. (RAM). RAM's application requests authority to construct additional transmitting facilities on frequency 152.24 MHz at St. Clair Shores, Warren, and Trenton, Michigan. RAM has filed an opposition to Port City's request and has also filed an amendment to its application. Port City filed a reply to the opposition.

2. Port City argues that RAM's proposal fails to show that its proposed facilities will not cause harmful electrical interference to Port City's station KUD204 station, as required by Section 22.15(b)(2)(i) of the Rules. Port City contends that using standard Carey analysis, RAM's proposed St. Clair Shores and Warren facilities would impair Port City's continued ability to serve its own Port Huron, Michigan, facility because of harmful co-channel electrical interference. This is so, Port City maintains, in spite of RAM's exhibit purporting to show co-channel interference-free operation. In support, of this proposition Port City submits the declaration of one of its own engineers.

3. Additionally, Port City alleges that RAM's application contains various inconsistencies and inaccuracies. For example, Port City states that in Item 36 of MOB-2, FCC Form 401, Sch. B, the exhibited antenna sketch shows the height of the entire proposed structure as 302 feet above ground level (AGL) and 882 feet above mean sea level (AMSL) whereas Commission records list these heights as 320 feet AGL and 899 feet AMSL. According to Port City, such defects raise the issue of RAM's intentional misreporting of engineering data based on previous RAM applications.

DISCUSSION

4. Port City's allegations are rejected. Our own review of the application as amended indicates that no interference problems currently exist. In addition, we do not believe that RAM has intentionally misrepresented data to the Commission. It appears to us that the discrepancies claimed by Port City were inadvertent errors by RAM. Port City has not submitted sufficient evidence that would warrant a finding that there was intentional misrepresentation on RAM's part. We nevertheless admonish RAM to exercise greater diligence in the filing of applications. If such carelessness continues, we envision taking strict measures including the dismissal of applications.

ORDERING PARAGRAPHS

5. Accordingly, IT IS ORDERED that the RAM Communications of Michigan, Inc. application, File No. 21013-CD-P/ML-03-87, IS GRANTED.

6. IT IS FURTHER ORDERED that the informal request for Commission action filed by Port City Communications, Inc. IS DENIED.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

Released: May 16, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NEW ENGLAND TELEPHONE'S PETITION FOR WAIVER OF CEI REQUIREMENTS AND REQUEST TO PERMIT INTERIM UNSEPARATED MARKETING

On May 11, 1988, the New England Telephone and Telegraph Company (NET) filed a petition requesting a waiver of the Commission's Comparably Efficient Interconnection (CEI) requirements. NET seeks permission to perform asynchronous/X.25 protocol conversion on a four-month trial basis in the state of Vermont in order to test the technical viability of a gateway service with a packet switching capability. According to NET, the gateway service will provide a directory of available information providers and will allow customers to obtain access to the information providers. NET also requests permission to perform unseparated marketing of this packet switching capability while it conducts the technical trial. NET states that it plans to start the trial on September 1, 1988.

According to NET, it will implement appropriate non-structural safeguards during the trial. If the trial is successful, NET will then file with the Commission for a permanent packet switching network in Vermont.

Interested parties should file comments on this petition by **June 13, 1988,** and reply comments by **June 23, 1988,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. Copies of NET's petition can be obtained from ITS, (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1
Phase II

In the Matter of

Annual 1988 Access Tariff Filings

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: May 17, 1988; Released: May 27, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 24, 1987, we released an Order initiating an investigation of the annual 1988 access tariff filings of several local exchange carriers (LECs).[1] The Order indicated that several matters merit investigation. We designated apparent inconsistencies between cost showings and demand forecasts for investigation in Phase I of this proceeding.[2] This Order designates the issues to be investigated in this phase of the 1988 Access Investigation and establishes the pleading cycle.

II. DESIGNATION OF ISSUES

A. *Inside Wire Costs*

2. The *December 24 Order* observed that inside wiring is a substantial nonregulated activity. Our examination of the cost support filed by the carriers in the 1988 tariff review plan (TRP) reveals that Tier 1 carriers have projected a regulated inside wire expense of 611 million. The 1988 projection for the maintenance expense alone is 239 million, only slightly less than the 289 million reported for the TRP test year (from July 1986 to June 1987). That projection is surprising in view of the fact that the installation and maintenance of inside wire was deregulated on January 1, 1987, so there is presumably only half a year of regulated inside wire activity in the test period. The carriers have failed to offer any reasonable explanation of this projection. It appears that a substantial part of the regulated inside wire expense that some carriers have included in the revenue requirement computation is in fact expense incurred for nonregulated activity. The Audits Branch sent a data request to these carriers, [3] and has received their responses. Those carriers are directed to include in their direct cases the data they submitted in response to the Audits Branch request, and to provide a complete justification for the apportionment of the relevant expenses between regulated and unregulated activities.[4]

B. *COE Category 3 Costs*

3. The new Part 36 Separations Manual replaced the former Central Office Equipment (COE) Categories 4, 5, 6, and 7 with a new COE Category 3. The new COE Category 3 consists primarily of local dial switching investment that was included in the former COE Category 6. The new Manual replaced the apportionment factors for the former Category 6 COE[5] with an apportionment based upon measured DEMs.[6] LECs are required to phase in the new apportionment over the 1988-1992 period. Our *December 24 Order* observed:

> The Commission adopted a transition for the implementation of the new COE Category 3 allocation because the Docket 80-286 Joint Board found that the new formula would produce a substantial shift in COE costs from the interstate to the intrastate jurisdiction. The Commission obviously anticipated that some shift would occur in the first year of the transition. The access charge computations of many LECs apparently produce the opposite result. The projected interstate allocation for 1988 is greater than the interstate allocation of comparable Part 67 categories that is reflected in the 1987 access tariffs. There may be a logical explanation for this surprising result, but it clearly warrants further inquiry.

December 24 Order at para. 65. We direct each of those LECs – the Bell Operating Companies (the BOCs), GTE Telephone Operating Companies (GTOC), Centel, Contel, Cincinnati Bell, Southern New England Telephone (SNET), Rochester and United – to include a detailed and well-documented explanation of the reasons for the increase in the direct case that it submits in the investigation. *Id.* We include the basic information required for this submission in Attachment A.

C. *COE Category 4. 23 Costs*

4. The new COE Category 4, Circuit Equipment, replaces former COE Category 8. Although most categories and subcategories have remained substantially unchanged, the Commission replaced the apportionment method for former COE Category 8.23 with a different apportionment method for the new COE Category 4.23. Both subcategories consist of LEC interexchange circuit equipment other than wideband. Under the former Part 67 rules, COE Category 8.23 costs were assigned on the basis of a count of circuit miles. Under the new procedures, this assignment is based on a count of terminations.

5. We established Phase I of this proceeding, in part, to determine whether the projected termination counts that certain LECs used to determine projected COE Category 4.23 separations factors are consistent with the projected demand quantities that the same carrier used to compute special access rates. Our examination of the Phase I submissions has not enabled us to resolve that question. We are accordingly requiring new submissions for each study area in the Phase II direct cases from each BOC, Cincinnati Bell, United, GTOC,[7] and SNET.[8]

6. In view of the change in apportionment procedures for this subcategory, we cannot limit our inquiry to adjustments to reflect demand changes. Each affected LEC must provide a step-by-step explanation of the procedures it used to determine total (*i.e.*, unseparated regulated) COE Category 4.23 investment and COE Category 4.23 separations factors. If possible, this explanation should include

baseline investment, COE Category 8.23 factors and hypothetical COE Category 4.23 factors as of June 30, 1987. If this is not possible, the LEC should provide the most comparable available data and explain why its procedures cannot produce the required data.

7. Each affected LEC should also provide the projected total COE Category 4.23 investment and projected COE Category 4.23 separations factors that it used or proposes to use to support its 1988 access rates and the projected termination counts that it is using to derive projected separations factors. The LEC should also provide a step-by-step explanation of the procedures it uses to derive projected quantities and factors, and should explain its reasons for concluding that the projected termination counts it uses to derive COE Category 4.23 interstate costs are consistent with the demand quantities it has used to compute special access rates. Such LECs should also demonstrate that the projected changes in unseparated COE Category 4.23 investment are consistent with projected changes in demand quantities. Attachment B describes data relating to COE Category 4.23 investment that must be supplied.

D. *Cable and Wire Facilities Costs*

8. We also instituted Phase I of this proceeding to examine possible inconsistencies between methods some LECs used to project total or unseparated regulated CWF investment and CWF separations factors and the demand quantities that those LECs used to compute special access rates. The Phase I submissions have not enabled us to reach definitive conclusions and we accordingly mandate that each LEC that is required to submit a direct case relating to COE Category 4.23 costs[9] also submit a new direct case showing its CWF costs. Attachment C provides guidelines for this filing.

9. These submissions must include baseline and projected unseparated investment and separations factors for each CWF category or subcategory[10] for each study area or each affected LEC.[11] Each affected LEC shall also provide the loop counts and other basic data used to derive baseline and projected separations factors. If the Part 36 Rules change the category or apportionment method, the LEC should also supply Part 67 and hypothetical Part 36 baseline separations factors and explain the methods used to implement the new rules.

10. Each affected LEC shall provide a detailed description of the methods used to develop projected loop counts and other units used to derive projected separations factors. It also shall demonstrate that those methods are consistent with the projected demand units such LEC used to compute special access rates. If Phase I filings or other submissions reveal that other LECs have used different methods to derive separations factors or demand units or to achieve consistency between cost and demand units, the affected LEC should explain why it believes its methods will produce results for its study areas that are more accurate than the alternative methods described by other LECs.[12]

11. We also direct New York Telephone (NYT) to respond in this portion of its Phase II direct case to the allegations in the motion Western Union Corporation (Western Union) filed on February 12, 1988.[13] Western Union charges that NYT has significantly overallocated costs to special access through using inflated counts of interstate special access loops, so that its current special access rates are substantially in excess of costs. Western Union bases its charge on a comparison of NYT's data in this proceeding with NYT data filed in a case before the New York Public Service Commission (NYPSC).[14]

E. *Voice Grade Special Access Demand*

12. Most LECs projected a decline in demand for voice grade special access lines in 1988, which those LECs attributed to the shift from voice grade to high capacity facilities. Although many private line customers have been, and will be, substituting DS1 or other high capacity facilities for ordinary voice grade lines, we concluded in the *December 24 Order* that many of the demand projections require further justification.[15] In its Phase II direct case, each Tier 1 carrier must provide additional justification and explanation for its voice grade special access demand projection. That justification should include actual data describing changes in voice grade and high capacity demand for a period of at least two years, including the most current available data.[16] The LEC should either demonstrate that its 1988 projection is consistent with recent demand trends or provide a complete explanation of its reasons for concluding that 1988 demand is likely to depart from recent trends.[17]

F. *Tax Issues*

13. Section 203(e) of the Tax Reform Act (TRA) requires that utilities pay back excess deferred taxes over the remaining book lives of the assets that created the tax deferral.[18] The *December 24 Order* observed that some carriers erroneously proposed an immediate flow-back and some carriers ignored the issue entirely. *Id.* at para. 107. We directed the LECs to correct their proposals. *Id.* It is our intention here to assure that the LECs have implemented the TRA in the proper manner. Accordingly, we are requiring that all Tier 1 carriers include in their direct cases a showing that their revenue requirement computations comply with the terms of that Section.

14. Our *December 24 Order* noted, at para. 106, that despite the reduced tax rate established in the TRA, several carriers proposed substantial federal income tax (FIT) expense increases in their equal access showings.[19] We stated that, absent any reasonable explanation of these tax increases, we would include this issue in our investigation. We have now more fully evaluated the TRPs of the relevant carriers, and find that, with one exception, the increased FIT showings are reasonably caused by changes in net rate base, rate of return, and other factors. The showing made by BellSouth (Kentucky) is anomalous, however, and we will include that in this phase of our investigation.[20]

G. *New England Telephone Separations Data*

15. New England Telephone did not provide sufficient information about its separations rates and amounts for any category in its original submission. *See December 24 Order* at para. 67 and n.202. We concluded in the *December 24 Order* that New England Telephone should provide the same level of detail that Southwestern Bell provided. We direct New England Telephone to do so as part of its Phase II direct case.[21]

H. *General Telephone of Florida*

16. The *December 24 Order* observed that the proposed access rates for GTE of Florida, which include substantial increases, are questionable, and that GTE has not re-

sponded sufficiently to questions raised in various petitions and comments. We accordingly require GTE of Florida to provide a *de novo* justification for all of its 1988 access charges.

I. Television and Radio Service

17. Our *December 24 Order* concluded that the increase in Illinois Bell television rates warrants investigation. The Networks contend that Ameritech's Illinois television proposal establishes unreasonable rates and fails to meet the expressed concerns of the Commission.[22] The Networks state that, in defiance of Commission guidelines, Ameritech's Illinois television service rate increases are based upon cost adjustment factors developed for other special access services and inappropriately applied to television. Networks Petition at 4. We accordingly designate here the issue of Ameritech's television service rate for Illinois, and direct Ameritech to respond to the concerns expressed in paragraphs 145 and 146 of our *December 24 Order*.[23]

III. DIRECT CASE CONTENTS

18. In addition to providing the information required by the Attachments to this Order, the LECs should discuss their selection and development of various CWF and COE separations categories factors or allocation factors.[24] Direct cases should address the following questions:

> How do the allocation factors correlate with the LECs' demand showings? How do separations units, such as loop counts and interexchange miles, correlate with demand units, such as channel terminations and channel mileage?[25] What is the relationship between the allocation factors themselves?[26]

19. As noted previously, the direct cases received in Phase I of this investigation were in many cases disorganized, incomplete, inaccurate, and abstruse.[27] Both commenters and members of the Commission staff face needless difficulty in analyzing tariff filings when this is the case. Our *Phase I Order* put LECs on notice that we would investigate further the issues considered in Phase I as well as related issues, and LECs have now had a period of some weeks to consider their data and how best to file it to further the purposes of this investigation. The Phase II direct case ordered here presents carriers with the opportunity to rectify, organize, complete, and verify their data. LECs are encouraged to make this showing as cogent, complete, and persuasive as possible.

20. It has also become clear, as we review the prior LEC submissions, that there are occasional departures from the TRPs and from Commission guidelines. We encourage LECs to use the direct cases required by this Order to explain their TRPs, their approved cost allocation manuals (CAMs), their carrier access billing system (CABS) methodologies, and any other guidelines and procedures that might assist in clarifying and justifying their tariff filings. Commenters have indicated inconsistencies between LECs' filings here and their submissions in the Joint Board (CC Docket No. 80-286) proceedings[28] or their submissions to various state commissions; we encourage LECs to explain these inconsistencies.

21. Various LECs have been challenged as proposing rates or presenting data that are out-of-trend. LECs should respond to such claims in the direct cases. Some LECs are charged with allocating cost to special access based on the number of multiplexed channels derivable from high capacity facilities rather than on the cost of the physical facilities themselves; these carriers should explain how such allocation is consistent with the requirements of Part 36 of the Commission's Rules.[29] Attachment D indicates some further guidelines LECs should consider in preparing their direct cases.

IV. PROCEDURAL REQUIREMENTS

22. This investigation will be conducted as a notice and comment proceeding. We have previously described the LECs who are required to file direct cases. Persons who filed petitions to reject, suspend, or investigate 1988 access tariffs of any of those LECs are also designated as parties. Direct cases shall be filed no later than **June 20, 1988,** and shall address the issues discussed above and provide all required information. The direct case must supply all information upon which the LEC relies to support its position. Pleadings opposing direct cases may be filed no later than **July 11, 1988,** and should be captioned "Opposition to Direct Case" or "Comments on Direct Case." The LEC parties may file a "Rebuttal," so captioned, to oppositions and comments no later than July 25, 1988.

23. If a LEC determines that its methodology or data were inaccurate or in error, and if a tariff revision correcting the rates accordingly is justified, the LEC should file such rate revisions. Any such filing should contain the information that would be provided in the carrier's direct case or the relevant portion of that direct case. These revisions should be filed not later than **June 20, 1988,** and should provide 45 days' notice. Petitions opposing any such tariff filings will be due under the schedule for tariffs filed on 45 days' notice.

24. An original and seven copies of all pleadings shall be filed with the Acting Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, NW, Washington, DC 20554. Members of the general public who wish to express their views in an informal manner may do so by submitting one copy of their comments to the Acting Secretary, Federal Communications Commission, Washington, DC 20554.

25. *Ex parte* contacts *(i.e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* comments must be filed, on the same day submitted, with the Acting Secretary for inclusion in the public file. A written summary of oral *ex parte* presentations must be served, on the same day presented, on the Acting Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. §§ 1.1200 *et seq.*

IV. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), that the issues set forth above ARE DESIGNATED FOR INVESTIGATION.

27. IT IS FURTHER ORDERED that each Tier 1 company shall file a direct case regarding the issues of demand projections, as discussed in paragraph 14, *supra*, and excess deferred taxes, as discussed in paragraph 15, *supra*.

28. IT IS FURTHER ORDERED that various individual local exchange carriers shall file direct cases as required above in paragraphs 2, 3, 5-7, 8-10, 11, 16, 17, 18, and 19, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Annual 1988 Access Tariff Filings, 3 FCC Rcd 1281 (1987) (*December 24 Order*).

[2] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase I, 3 FCC Rcd 50 (1988) (*Phase I Designation Order*). These Phase I issues were addressed in a recent Bureau action. Annual 1988 Tariff Filings, CC Docket No. 88-1, Phase I, DA 88-294, released Feb. 29, 1988 (*Phase I Order*). Pleadings were filed in the Phase I proceedings by Ad Hoc Telecommunications Users Committee (Ad Hoc); Aeronautical Radio, Inc. (ARINC); American Telephone and Telegraph Company (AT&T); MCI Communications Corporation (MCI); Nationwide Communications, Inc., WPOC-FM (WPOC); Television Services User Parties (National Association of Broadcasters, Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc. -- together, the Networks); Western Union Corporation (Western Union); WCTN Radio (WCTN); WKEN; WLIF; and WROQ.

[3] Letter of Feb. 3, 1988, from Chief, Audits Branch, Accounting and Audits Division, Common Carrier Bureau, to Mr. James Smith, Director, Federal Regulatory Matters, Ameritech Corp.; Ms. Dana Rasmussen, Director, Federal Regulatory, US West; Mr. Thomas E. Lawrence, Director, Federal Regulatory Accounting and Financial Matters, NYNEX Corp.; Mr. David Hesidence, Director, Federal Regulatory, Bell Atlantic Corp.; Mr. Maurice Talbot, Jr., Director, Federal Regulatory, BellSouth Corp.; Ms. Carolyn Hill, Associate Washington Counsel, United Telecommunications, Inc.; Mr. William F. Adler, Director, Federal Regulatory Matters, Pacific Telesis Corp.; Mr. Whitney Hatch, Director, Regulatory Matters, GTE Service Corp.; and Mr. Stephen Melnikoff, Executive Director and Attorney, Federal Regulatory Matters, Southwestern Bell Corp.

[4] The *December 24 Order* also directed each Tier 1 LEC to submit a complete explanation of the apportionment of all costs between regulated and unregulated activities. Those filings were submitted on April 28, 1988, and are presently being evaluated. We are not including unregulated activity apportionment questions other than inside wire apportionment questions in this phase of this investigation.

[5] A frozen Subscriber Plant Factor was ised to allocate the non-traffic sensitive portion and dial equipment minutes (DEMs), including toll weighting factors, were used for a traffic sensitive factor.

[6] 47 C.F.R. § 36.125. That formula was modified for study areas with fewer than 50,000 access lines.

[7] GTOC was initially isolated from this group by the continued suspension of its tariff filing in our *Phase I Order*. A subsequent Order, however, denied requests to extend the suspension of the GTOC tariffs, so GTOC is included here with other carriers whose tariffs are in effect but under investigation. Annual 1988 Access Tariff Filings, GTE Telephone Operating Companies, CC Docket No. 88-1, Phase I, Part 2, DA 88-530, released Apr. 14, 1988.

[8] Although many Phase II submissions relating to COE Category 4.23 and Cable and Wire Facilities (CWF) costs will necessarily include data previously submitted, each carrier should include all relevant data in its Phase II direct case. Such a complete submission will assist us in resolving these questions expeditiously and should make it easier for other parties to prepare their pleadings. In order to assist the LECs in providing us with the needed information in a usable format, we are supplying, in Attachment E, a set of guidelines for the new direct cases. We also attach specific information requests regarding COE Category 3, COE Category 4.23, and CWF costs. *See* Attachments A, B, and C.

[9] *See* para. 5, *supra*.

[10] Category or subcategory means the categories described in Part 36 or former Part 67 of the Commission's Rules.

[11] "Affected LECs," as used here, are those LECs listed in para. 3, *supra*.

[12] With regard to multiplex equivalencies -- for CWF Category 2 (wideband and exchange trunk); COE Category 4.11 (wideband exchange); COE Category 4.12 (wideband and non-wideband exchange trunk) and COE Category 4.22 (wideband interexchange), but not COE Category 4.23 (non-wideband interexchange) -- filing carriers are directed to explain how multiplexed high capacity channels are reflected in cost assignments, and in particular, whether such channels are assigned as some multiple of voice grade equivalencies.

[13] NYT special access tariffs were suspended in the *December 24 Order*. On February 8, 1988, the Bureau lifted the suspension of NYT special access tariffs and deferred further proceedings with respect to NYT's direct case, because revisions to its original special access rates resulted in overall rate reductions. Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase I, 3 FCC Rcd 926 (1988).

[14] Western Union states that NYT's filing before the NYPSC shows a count of interstate and intrastate private line loops and loop billing elements (channel terminations) for October-November 1987, in contradiction to NYT's direct case here. Western Union maintains that NYT offers no direct support for the accuracy of its forecast of loops used to allocate CWF Category 1 and COE Category 4.13 to special access. Here, NYT used projected channel terminations multiplied by a loop-to-channel termination ratio to produce a quantity of loops close to that used for cost allocation purposes. Western Union argues that the key element in the analysis is the reliability of NYT's loop-to-channel termination ratio. Western Union states that NYT's filing here noted an historical ratio of 1.4577, then adjusted the resulting loop count upward to reflect an assertedly increasing trend in the ratio. NYT's NYPSC data, according to Western Union, show a loop-to-channel termination ratio of only 1.26. Western Union claims that this means that NYT has overestimated the number of loops used to allocate costs to interstate special access in this

proceeding. Western Union Motion at 2-3. Western Union also charges NYT with presenting contradictory showings with regard to co-location factors and counts of intrastate loops used in its development process. *Id.* at 5. Ad Hoc TelecommunicationsUsers Committee (Ad Hoc) and MCI filed comments in support of Western Union's motion. New York Telephone did not reply.

[15] *December 24 Order* at para. 2.

[16] This two-year data collection must include actual data at least through December 1987.

[17] If any LEC concludes that its October 1987 demand projection should be revised, such a LEC should, of course, provide a complete description of the effects of such a revision upon all of its baseline cost, revenue, and rate computations.

[18] Tax Reform Act, Pub. L. No. 99-514, 100 Stat. 2085 (Oct. 22, 1986).

[19] MCI petitioned on this issue, found at line 350 of TRP COS-7. MCI charged that two carriers proposed increases of 100 percent or more, and that four additional carriers proposed increases of over 70 percent. MCI Petition at 55.

[20] BellSouth (Kentucky) shows a 12.3995 percent 1988 rate of return, unusually high fixed costs for previous year cost of service (PYCOS) and a significant increase in these costs for 1988, a relatively stable net rate base, and a 100 percent increase in FIT expense. BellSouth submitted errata on October 22 and 27, 1987, but did not discuss or modify its COS-7 showing. BellSouth (Kentucky) is accordingly ordered to file a new COS-7 showing as a part of its direct case.

[21] This portion of the direct case should, of course, be limited to categories other than COE Category 3, COE Category 4.23 and CWF. New England Telephone should provide the latter information in earlier portions of its direct case.

[22] Networks Petition at 3-4 (citing *December 24 Order* at paras. 145-146), challenging Ameritech Transmittal No. 153, filed Jan. 25, 1988.

[23] Although our *Phase I Order* declined to suspend Ameritech's Tr. No. 153, including Ameritech's television service rates for Illinois, that Order placed this transmittal under investigation and stated that we might require changes in these rates in subsequent Docket 88-1 proceedings. *Id.* at paras. 10 and 6.

[24] The LECs' response to our *Designation Order* requests, at para. 7, that carriers provide these factors on both historical and prospective bases, and that they supply the basic data used to develop the factors, has been unsatisfactory and inadequate. We note the arguments of several commenters that these cost assignments and allocations are unclear, *e.g.*, AT&T Comments at 13-17, and direct the LECs again to provide more and better explanation and data. We also note Ad Hoc's argument that New England Telephone did not employ projected separations factors, but used data representing historical demand. Ad Hoc Petition at 22-24. New England Telephone should use the filing required by this Order to respond to Ad Hoc's charge.

[25] *See , e.g., December 24 Order* at para. 7; AT&T Comments at 17 *et seq.*

[26] Overstatement of loop or mileage counts due to faulty reconciliation can result in overstatement of the revenue requirement. *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, released Mar. 8, 1985, App. A at para. 26.

[27] Many of the data collections were considerably fleshed out during the rebuttal stage of the pleadings in Phase I, by the addition of information that should rightly have been included in the direct case initially.

[28] *See, e.g.,* Western Union Opposition, passim.

[29] *See, e.g.,* Ad Hoc Opposition at 14-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-349

In the Matter of

Amendment of Section 73.202(b), RM-5679
Table of Allotments,
FM Broadcast Stations.
(London, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 25, 1988; Released: May 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5594 (1987), proposing to allot Channel 223A to London, Kentucky, at the request of Hughes-Moore Associates, Inc. (petitioner). Comments were filed by the petitioner restating its interest in the channel.

2. We find that the public interest would benefit from the proposed allotment which would provide a second FM service to London. The transmitter site for Channel 223A at London is restricted to 1.3 kilometers (0.8 mile) north of the city to meet the spacing requirements to pending applications for Channel 222A at Hyden, Kentucky.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
London, Kentucky	223A, 280A

4. The window period for filing applications will open on **July 18, 1988,** and close on **August 17, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for Channel 223A at the restricted site are 37-07-46 and 84-06-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-222

In the Matter of

Amendment of Section 73.202(b), RM-6259
Table of Allotments,
FM Broadcast Stations.
(Mexico Beach, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 25, 1988; Released: May 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Robert G. Kerrigan (petitioner), permittee of Station WMOA(FM), Channel 257A, Mexico Beach, Florida, the Commission herein considers a petition for rule making to modify his construction permit to a Class C2 facility on the same channel. Petitioner submitted information in support of the proposal.

2. The modification can be made in compliance with the minimum distance separation requirements with a site restriction 2.6 kilometers (1.6 miles) east of Mexico Beach to avoid short spacing to Station WFTN-FM (Channel 258C2), Fort Walton Beach, Florida.[1] The proposal for Channel 257C2 at Mexico Beach is short spaced by more than 30 kilometers to WFTW-FM's present operation on Channel 257A. In a *Report and Order*, 2 FCC Rcd. 5234 (1987), the license of Station WFTW-FM was modified to Channel 258C2. A final decision on the proposed modification at Mexico Beach must be delayed until WFTW-FM is licensed as a Class C2 facility.

3. In accordance with our established policy, we shall propose to modify the construction permit of Station WMOA(FM) to specify operation on Channel 257C2, as requested. Pursuant to Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest for Channel 257C2 at Mexico Beach.

4. Comments are invited on the proposal to amend the FM Table of Allotments (Section 73.202(b) of the Rules) with respect to the following community:

	Channel No.	
City	Present	Proposed
Mexico Beach, Florida	257A	257C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 22, 1988,** and reply comments on or before **August 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Arthur V. Belendiuk
1920 N. Street, N.W.
Suite 510
Washington, D.C. 20036
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 257C2 at the restricted site are 29-56-32 and 85-23-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-223

In the Matter of

Amendment of Section 73.202(b), RM-5918
Table of Allotments,
FM Broadcast Stations.
(Waynesboro, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 25, 1988; Released: May 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Clifford Jones (petitioner) seeking the allotment of Channel 296A to Waynesboro, Georgia, as that community's second FM service. Petitioner states his intention to apply for use of the channel, if allotted.

2. Channel 296A can be allotted to Waynesboro in compliance with the Commission's minimum distance separation requirements with a site restriction 2.2 kilometers (1.4 miles) north of Waynesboro.[1] This restriction is necessary to avoid short spacing to Station WCLA-FM, Claxton, Georgia, operating on Co-Channel 296A.

3. In view of the fact that the proposed allotment could provide a first FM service to Waynesboro, Georgia, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with regard to the following community:

	Channel No.	
City	Present	Proposed
Waynesboro, Georgia	---	296A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 22, 1988,** and reply comments on or before **August 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lawrence J. Bernard, Jr.
Ward and Mendelsohn, P.C.
1100 17th Street, N.W.
Suite 900
Washington, D.C. 20036
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 33-06-41 and 82-01-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-220

In the Matter of

Amendment of Section 73.202(b), RM-6220
Table of Allotments,
FM Broadcast Stations.
(Hilo, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 25, 1988; Released: May 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers a petition for rule making filed by Irving A. Uram (petitioner), which seeks to substitute Channel 224C1 for Channel 224A at Hilo, Hawaii, and to modify his construction permit (BPH841278MH) to specify Channel 224C1.

2. A staff engineering study reveals that Channel 224C1 can be allotted to Hilo in conformity with the minimum distance separation requirements of Section 73.207(b) of the Rules. Petitioner proposes to utilize his present transmitter site at coordinates 19-43-51 and 155-04-11.

3. As requested, we shall propose to modify the petitioner's construction permit to specify operation on Channel 224C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest or require the petitioner to demonstrate the availability of an additional equivalent channel.

4. We believe that the public interest would be served by proposing the substitution of channels at Hilo, in order to provide that community with an opportunity for its fifth wide coverage area station. Accordingly, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to Hilo as follows:

	Channel No.	
City	Present	Proposed
Hilo, Hawaii	224A, 234C1, 246C2, 250C2, 262C1	224C1, 234C1, 246C2, 250C2, 262C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 22, 1988,** and reply comments on or before August 8, 1988, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis J. Kelly
Cordon and Kelly
1920 N. Street, N.W.
Washington, D.C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-236

In the Matter of

Amendment of Section 73.202(b), RM-5725
Table of Allotments,
FM Broadcast Stations.
(Carthage, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 29, 1988; Released: May 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Bryan Broadcasting, Inc. (Bryan) requesting the substitution of Channel 221B1 for Channel 221A at Carthage, Illinois, and modification of its Class A license for Station WCAZ-FM at Carthage to specify the Class B1 channel. Petitioner submitted information in support of the proposal.

2. The channel substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules. The transmitter site for Channel 221B1 is restricted to 13.7 kilometers (8.5 miles) southwest of the city to avoid short spacing to Station WJRE(FM), Channel 221A, Kawanee, Illinois, and avoid overlap of the WKAZ's 60 dBu contour and the grade B contour of Channel 6 TV Station KWQC at Davenport, Iowa.[1]

3. In accordance with Section 1.420(g) of the Commission's Rules we shall propose to modify the license of Station WCAZ-FM to specify Channel 221B1, as requested by the petitioner.

4. Accordingly, in order to provide Carthage with its first wide coverage area FM station, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Rules, with regard to the following community:

	Channel No.	
City	Present	Proposed
Carthage, Illinois	221A	221B1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 22, 1988,** and reply comments on or before **August 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard J. Hayes, Jr.
1359 Black Meadow Drive
Spotsylvania, Virginia 22553
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 221B1 at this restricted site are 40-18-01 and 91-11-54. Bryan submitted an engineering study utilizing hypothetical transmitter site coordinates, and stated that no overlap to Channel 6 Station KWQC would occur. Therefore, we assume that Bryan does not intend to specify a facility the 60 dBu contour of which would overlap the Grade B contour of KWQC, and have imposed an appropriate site restriction. If our assumption as to Bryan's intentions is incorrect, Bryan should submit a preclusion study concerning the effects of the proposed upgrade on the upper portions of the reserved band. See Report and Order 2 FCC Rcd. 660 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-237

In the Matter of

Amendment of Section 73.202(b), RM-6130
Table of Allotments,
FM Broadcast Stations.
(Joshua Tree, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 29, 1988; Released: May 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. Craig L. Fox (petitioner) has filed a petition for rule making seeking the allotment of Channel 221A to Joshua Tree, California, as that community's first local broadcast service. Petitioner states that he will apply for the channel, if it is ultimately allotted.

2. A staff engineering analysis has determined that Channel 221A can be allotted to Joshua Tree consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is restricted to an area at least 13.3 kilometers (8.2 miles) east[1] of the community to avoid short-spacing to an application (BPED-870227OO) filed by Station KVCR(FM), Channel 220B1, to reclassify its facilities to Class B status. However, the site restriction is too far for the Commission to assume that a station operating on Channel 221A could provide Joshua Tree with the 70 dBu signal required by Section 73.315 of the Rules. Therefore, petitioner is requested to provide a study showing that proposed Channel 221A could provide the required city-grade coverage to all of Joshua Tree from the restricted site, or from a site meeting the minimum distance separation requirements.

3. In view of the foregoing, and since the instant proposal could provide a first local broadcast service to Joshua Tree, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.207(b) of the Commission's Rules with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Joshua Tree, California	–	221A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 22, 1988,** and reply comments on or before **August 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Craig L. Fox
1213 Madison Street
Syracuse, NY 13210-2027

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Reference coordinates of the restricted site are 34-09-27 and 116-10-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-234

In the Matter of

Amendment of Section 73.202(b), RM-6197
Table of Allotments,
FM Broadcast Stations.
(Aberdeen, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 28, 1988; Released: May 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Tenn-Tom Broadcasting Corporation (petitioner), requesting the substitution of FM Channel 287A for Channel 288A at Aberdeen, Mississippi. Petitioner also requests the modification of its license for Station WWZQ-FM, Channel 288A, to specify operation on Channel 287A. Petitioner states its intention to file an application for Channel 287A.

2. In support of its request, petitioner states that Station WWZQ-FM is operating with facility coverage that has a severe site restriction placed upon it by a new Class C2 station in Starkville, Mississippi, which could be removed by the requested substitution of channels. According to petitioner, permitting Station WWZQ-FM to change its assignment will give it greater coverage to the Aberdeen area.

3. We believe petitioner's proposal warrants consideration. Channel 287A can be allocated to Aberdeen at petitioner's site in compliance with the minimum distance separation requirements of the Commission's Rules.[1] We shall propose to modify the license held by Tenn-Tom Broadcasting Corporation to specify operation on Channel 287A in accordance with Section 1.420(g) of the Commission's Rules.

4. In view of the above, the Commission believes the public interest would be served by proposing the channel substitution as it could decrease the site restriction on the Aberdeen channel and provide greater coverage to the Aberdeen area. Therefore, we shall propose to modify the license of Station WWZQ-FM to specify operation on Channel 287A in lieu of Channel 288A, in accordance with Section 1.420(g) of the Rules.

5. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's rules as follows:

	Channel No.	
City	Present	Proposed
Aberdeen, Mississippi	288A	287A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **July 22, 1988,** and reply comments on or before **August 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jim Buffington, President
Tenn-Tom Broadcasting Corporation
P.O. Drawer 1240
Aberdeen, Mississippi 39730

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex exparte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 287A at Aberdeen are 33-48-32 and 88-32-33.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-235

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Corcoran, Kernville and Mendota, California) RM-6279

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: April 25, 1988; Released: May 31, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein a petition for rule making filed on behalf of Radio Corcoran, Inc., permittee of Station KLCZ(FM) (Channel 272A), Corcoran, California, seeking the substitution of Channel 272B1 for Channel 272A and modification of its permit accordingly. In order to accomplish its proposal in compliance with Section 73.207(b) of the Commission's Rules, petitioner advises that additional changes are required at Kernville and Mendota, California. In the first instance, petitioner seeks the substitution of Channel 273A for Channel 272A at Kernville, licensed to Station KKRV(FM), and the concomitant modification of its license. Secondly, petitioner seeks the substitution of Channel 263A[1] for Channel 272A at Mendota.[2]

2. A staff engineering analysis reveals that Channel 272B1 can be substituted for Channel 272A at Corcoran, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules provided the transmitter therefor is located at least 15.8 kilometers east [3] of the community to avoid short spacing to Station KRKC(FM) (Channel 271B), King City, California. Channel 273A can be substituted for Channel 272A at Kernville at the present site of Station KKRV-FM.[4] Channel 263A can be substituted for Channel 272A at Mendota consistent with the technical requirements of our Rules.[5] Although the latter substitution is 15.9 kilometers short spaced to the existing licensed site of Station KFIG-FM,[6] (Channel 266B), Fresno, California, it meets the spacing requirements to an application of KFIG-FM for modification of its construction permit.[7] Therefore, finalization of the latter substitution is contingent upon the issuance of a license to cover those facilities (see File No. BMPH-871228IC). In the event Station KFIG-FM's application is not granted, we will optionally propose herein to delete Channel 272A at Mendota since no applications were filed therefor during the open window period.

3. In consideration of the above, we propose to modify petitioner's permit to specify operation on Channel 272B1, as requested. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we shall not accept other expressions of interest in the use of Channel 272B1 at Corcoran. In addition, we shall direct an *Order to Show Cause* to Station KKRV(FM) (Channel 272A), Kernville, California, as to why its license should not be modified to specify operation on Channel 273A.

4. Whenever an existing licensee (or permittee) is ordered to switch frequencies in order to accommodate a new channel allotment, the benefiting party is required to reimburse the affected station for costs incurred therewith. Petitioner herein has stated its willingness to reimburse Station KKRV(FM) for reasonable costs associated with changing from Channel 272A to Channel 273A.

5. Accordingly, in order to provide Corcoran, California, with its first wide area coverage FM service, we shall optionally propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

OPTION I

City	Channel No. Present	Proposed
Corcoran, California	272A	272B1
Kernville, California	272A	273A
Mendota, California	272A	263A

OPTION II

Corcoran, California	272A	272B1
Kernville, California	272A	273A
Mendota, California	272A	–

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Kern Valley Broadcasting Co., Inc., licensee of Station KKRV(FM), Kernville, California, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 273A in lieu of Channel 272A.

7. Pursuant to Section 1.87 of the Commission's Rules, Kern Valley Broadcasting Co., Inc., may, not later than **July 22, 1988,** file a written statement showing with particularity why its license should not be, modified as proposed in the *Order to Show Cause*. The Commission may call on Kern Valley Broadcasting Co., Inc. to furnish additional information. If Kern Valley Broadcasting Co., Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Kern Valley Broadcasting Co., Inc. will be deemed to have consented to the

modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above- mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND, a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following:

Kern Valley Broadcasting Co., Inc.
P. O. Box 995
Kernville, CA 93238

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **July 22, 1988,** and reply comments on or before **August 8, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Nancy L. Wolf, Esq.
Dow, Lohnes & Albertson
1255 -23d St., NW
Washington, DC 20037

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner requested the substitution of Channel 295A in lieu of Channel 272A at Mendota. However Channel 295A has been requested for use as a first local service at Los Banos, California (RM-5952). Therefore, in an effort to accommodate petitioner's proposal, we have determined that Channel 263A can be substituted for Channel 272A at Mendota in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

[2] Channel 272A was allotted to Mendota in MM Docket No. 84-231. The filing window therefor closed on July 10, 1987, without evoking any interest. Consequently, the allotment may now be altered, as requested. *See* , Memorandum Opinion and Order, 51 FR 36401, October 10, 1986.

[3] Reference coordinates used for this determination are 36-06-33 and 119-22-55.

[4] Reference coordinates at the present site of Station KKRV(FM) are 35-37-21 and 118-26-16.

[5] Reference coordinates utilized in this determination are those of the center city, 36-45-12 and 120-22-54.

[6] Reference coordinates at Station KFIG-FM's licensed site are 36-44-10 and 119-47-13.

[7] Reference coordinates at Station KFIG-FM's application site are 36-55-48 and 119-38-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-181

In the Matter of

Amendment of Section 73.202(b), RM-5500
Table of Allotments,
FM Broadcast Stations.
(Earl Park,[1] Indiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 13, 1988; Released: June 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 3478 (1987), issued in response to a petition filed on behalf of IBN Broadcasting, Inc. (petitioner), licensee of Station WIBN(FM) (Channel 252A), Earl Park, Indiana, proposing the substitution of Channel 251B1 for Channel 252A and modification of its license accordingly to specify operation on the higher class channel. Petitioner filed supporting comments reaffirming its intentions. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 251B1 for Channel 252A at Earl Park, Indiana, since it could provide the community with its first wide coverage area FM service. As indicated in the *Notice*, Channel 251B1 can be allotted to Earl Park consistent with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules, provided the transmitter therefor is located in an area approximately 9.6 kilometers (6 miles) south[2] of the community to avoid short spacing to Station WLQI(FM) (Channel 249A), Rensselar, Indiana, as well as Station WLUP-FM (Channel 250B), Chicago, Illinois.

3. In consideration of the foregoing, we believe this proposal is in the public interest. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station WIBN(FM) to specify operation on Channel 251B1 at Earl Park, Indiana.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Earl Park, Indiana, as set forth below:

City	Channel No.
Earl Park, Indiana	251B1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of IBN Broadcasting, Inc. for Station WIBN(FM), Earl Park, Indiana, IS MODIFIED effective **July 15, 1988,** to specify operation on Channel 251B1 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and,

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to IBN Broadcasting, Inc., 726 Vine Street, West Lafayette, IN 47906, and by regular mail to petitioner's counsel, Richard J. Hayes, Jr., Esq., 1359 Black Meadow Road, Spotsylvania, VA 22553.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Although the *Notice* also proposed to reallocate Channel 252A from Fowler, Indiana to Earl Park to reflect its actual use in the latter community, that aspect of the proposal is now moot. *See, Revised FM Table* of Allotments Implementing BC Docket No. 80-90, 2 FCC Rcd 6180 (1987).

[2] Reference coordinates at the restricted site are 40-36-00 and 87-26-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-281

In the Matter of

Amendment of Section 73.202(b), RM-5847
Table of Allotments,
FM Broadcast Stations.
(Chelan, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 28, 1988; Released: June 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Northcentral Broadcasting Co. (petitioner), licensee of Station KOZI-FM and AM, Chelan, Washington, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 4623 (1987), proposing the substitution of Channel 228C2 for Channel 228A at Chelan. In addition, petitioner proposed modification of its license to specify operation on the higher class channel as a first wide coverage area FM service at Chelan. Petitioner filed comments.

2. As stated in the *Notice*, the substitution can be made consistent with the Commission's minimum separation requirements with a site restriction of 28.8 kilometers (17.9 miles) east of Chelan.[1] The restricted site is necessary in order to avoid a short spacing to Station KUBE(FM), Channel 227C, Seattle, Washington.

3. In comments, petitioner claims that the restricted site imposed by the Commission would not permit Station KOZI-FM to provide suitable service to its community of license. Petitioner asserts that terrain factors would never permit the delivery of a line-of-sight signal to Chelan. Petitioner states that its initial engineering data was geared to its station's present site for the upgrade. Further, petitioner states that it had presumed that Station KUBE(FM) was a Class C1 facility. Therefore, petitioner declines the Commission's proposal as contained in the *Notice* because of the required site restriction.

4. Since the petitioner's rejection of the proposal at the restricted site raises issues concerning the inability of Channel 228C2 to provide a city-grade (70 dBu) signal over the entire principal community to be served, we find that the proposal as stated in the *Notice*, is technically defective. Therefore, we shall deny the request for failure to comply with Section 73.315(a) of the Commission's Rules.

5. Accordingly, in view of our findings herein, IT IS ORDERED, That the petition of Northcentral Broadcast Co., proposing the substitution of FM Channel 228C2 for Channel 228A at Chelan, Washington, IS HEREBY DENIED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The *Notice* erroneously identified the restricted site as the petitioner's current transmitter site.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-243

In the Matter of

Amendment of Section 73.202(b),	RM-5747
Table of Allotments,	
FM Broadcast Stations.	
(Winfield, Texas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 28, 1988; Released: June 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Northeast Texas Broadcasting, Inc.[1] (petitioner), licensee of Station KLSB(FM), Channel 249A, Winfield, Texas, the Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 4226 (1987), proposing the substitution of Channel 249C2 for Channel 249A at Winfield. Petitioner also requested the modification of its station's license to specify operation on the higher class co-channel. Supporting comments were filed by the petitioner reaffirming its intention to promptly construct the new facilities.

2. Channel 249C2 can be allocated to Winfield, Texas, as a substitute for Channel 249A, consistent with the Commissionis minimum separation requirements with a site restriction of 14.0 kilometers (8.7 miles) north of the city.[2] The restricted site is necessary to avoid short spacings to Station KWRW(FM), Channel 249A, Rusk, Texas and Station KZEW(FM), Channel 250, Dallas, Texas.

3. In view of the fact that Winfield could receive its first wide coverage area FM station, we believe the public interest would be served by the substitution of Channel 249C2 for Channel 249A at that community. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station KLSB(FM) to specify operation on Channel 249C2.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 15, 1988**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Winfield, Texas	249C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KLSB(FM), Winfield, Texas, IS MODIFIED, to specify operation on Channel 249C2 in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Formerly Reynolds-Palmer Media, Inc.

[2] The restricted site coordinates are 33-17-39 and 95-06-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-411

In the Matter of

Amendment of Section 73.202(b), RM-5864
Table of Allotments,
FM Broadcast Stations.
(Owensville, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 25, 1988; Released: June 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd. 6100 (1987), issued in response to a petition filed by Owensville Communications Company (petitioner) proposing the substitution of FM Channel 237C2 for Channel 237A at Owensville, Missouri. Petitioner also requested the modification of its permit for Channel 237A (BPH-850312MB), to specify operation on Channel 237C2. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of FM Channel 237C2 for Channel 237A at Owensville, Missouri, since it could provide the community with its first wide coverage area FM service. Channel 237C2 can be allocated to Owensville in compliance with the minimum distance separation requirements of the Commission's Rules.[1]

3. We have authorized in paragraph 5, a modification of petitioner's permit for Channel 237A to specify operation on Channel 237C2, in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Owensville, Missouri	237C2

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Owensville Communications Company, Owensville, Missouri, IS MODIFIED to specify operation on Channel 237C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 237C2 are 38-15-22 and 91-32-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-409

In the Matter of

Amendment of Section 73.202(b), RM-5940
Table of Allotments,
FM Broadcast Stations.
(Middleport, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 28, 1988; Released: June 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Radio Mid-Pom, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6104 (1987), proposing the substitution of Channel 221B1 for Channel 221A at Middleport, Ohio, and the modification of its license for Station WMPO-FM to specify the higher powered channel. Petitioner filed comments supporting the allotment and reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. As stated in the *Notice*, Channel 221B1 can be allotted to Middleport in compliance with the Commission's minimum distance separation requirements with a site restriction of 23 kilometers (14.7 miles) northeast to avoid a short-spacing to Station WMEJ, Channel 220A, Proctorville, Ohio, and to Station WXGT, Channel 222, Columbus, Ohio. However, since this distance is too far for the Commission to assume that the station could provide the entire community with the required 70 dBu city grade coverage, petitioner was requested to furnish a showing demonstrating compliance with Section 73.315 of the Commission's Rules. In response, petitioner states that a study based on the terrain between the city reference coordinates and the coordinates identified by the Commission as an assumed transmitter site shows that "a transmitter located at the reference site will illuminate the city with the required 70 dbu signal as required by the Rules, for the distance to the 70 dbu contour extends well beyond the city reference coordinates." Petitioner goes on to states that it believes that there are a number of adequate sites available which would permit compliance with Section 73.315 of the Commission's Rules.

3. Section 73.315 of the Commission's Rules requires that a transmitter be so located as to place a minimum field strength of 70 dBu, or 3.16 mV/m, over the entire principal community to be served. Generally, rule making proponents are required only to show that a hypothetical site exists from which the proposed station could provide the entire community with the required city-grade service. Therefore, we require these proponents to base their city-grade coverage showing on an assumption of uniform rather than actual terrain. We find that petitioner's showing is fatally deficient. First, its statement as to compliance with the required 70 dBu coverage is based upon actual terrain between an assumed transmitter site and the city, rather than on the required assumption of uniform terrain for all the area surrounding the community. Further, petitioner provides no map showing the 70 dBu contour and its relation to Middleport's boundaries. Even assuming that petitioner is correct in asserting that the requisite signal will be placed over the city reference coordinates, our rules require coverage of the entire city and not simply the city reference coordinates. Therefore, we are unable to determine that Channel 221B1 can be allocated to Middleport in compliance with the Commission's technical requirements.

4. Based on the above discussion, we find that petitioner's request for the allotment of Channel 221B1 to Middleport must be denied. Accordingly, IT IS ORDERED, That the petition of Radio Mid-Pom, Inc. for the substitution of Channel 221B1 for Channel 221A at Middleport, Ohio, and the modification of its license for Station WMPO-FM, IS DENIED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-27

In the Matter of

Amendment of Section 73.202(b),	RM-5157
Table of Allotments,	RM-5364
FM Broadcast Stations.	
(Topsail Beach and Wilmington,	
North Carolina)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 27, 1988; Released: June 1, 1988

By the Chief, Policy and Rules Division:

1. The Commission has before it the petition for reconsideration filed by Winfas of Belhaven, Inc. (Winfas), licensee of Station WJKA, Channel 266C2, Belhaven, North Carolina, of the *Second Report and Order*, 3 FCC Rcd 159 (1988), which: (1) granted the request of Woolfson Broadcasting Corporation of Wilmington, Inc. (Woolfson) to substitute Channel 266C2 for Channel 265A at Wilmington, North Carolina, and modify its license for Station WWQQ-FM accordingly; (2) denied Winfas' counterproposal that Channel 267C2 be allocated to Wilmington instead of Channel 266C2; and (3) ordered Winfas to amend its pending application for Channel 266C2 at Belhaven (BPH-861103IG) to specify a transmitter site which would comply with the Wilmington allotment. Woolfson filed an opposition to the petition for reconsideration. However, Woolfson has now withdrawn its opposition and the parties have filed a "Joint Request for Commission Action and Termination of Proceeding."

2. In the *Second Report and Order*, the Commission found that Woolfson had made a convincing showing that use of either Channel 266C2 or Channel 267C2 at Wilmington at a site which met the spacing requirements to the pending application of Winfas at Belhaven was not feasible. Winfas states in its Petition for Reconsideration that a site does exist which would permit Station WWQQ-FM to upgrade on Channel 267C2 and provide Wilmington with the required 3.16 mV/m city-grade signal and also allow grant of Belhaven's application for Channel 266C2. Specifically, it states that Station WWQQ-FM, operating on Channel 267C2, could co-locate its antenna on the tower to be constructed by Station WSFM, Southport, North Carolina (BPH-870331JM). It states that it has received verbal confirmation from Station WSFM that it will agree to rent the tower space to Station WWQQ-FM and that the tower could be built to support two Class C2 antennas at maximum Class C2 facility height above average terrain or greater. Further, Winfas notes that the Federal Aviation Administrative has been notified of the proposed construction and has issued a determination of no hazard for a tower 500 feet above ground at the coordinates specified in Station WSFM's construction permit. In its joint request for Commission action, Woolfson concurs in the showing made by Winfas and joins in the request for the allotment of Channel 267C2 to Wilmington, the modification of Station WWQQ-FM's license accordingly, and the grant of Winfas' pending application for Channel 266C2 at Belhaven.

3. Based on the above information, we believe the public interest would be served by granting the petition for reconsideration. There appears to be a transmitter site available from which Station WWQQ-FM can operate on Channel 267C2 in compliance with the Commission's technical requirements and also permit use of the transmitter site proposed by Winfas for Station WJKA at Belhaven. Thus, both stations will still be permitted to expand their service areas and provide an increased service to the residents in the vicinity of both Belhaven and Wilmington without the possible delay occasioned by requiring Station WJKA to amend its pending application. Channnel 267C2 can be allotted to Wilmington in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.8 kilometers (12.9 miles) south to accommodate Woolfson's desired transmitter site.[1] In addition, the pending application of Winfas of Belhaven, Inc. for Station WJKA at Belhaven need not be amended as ordered in the *SecondReport and Order* herein.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Wilmington, North Carolina	247C, 267C2, 274C1, 287A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Woolfson Broadcasting Corporation of Wilmington, Inc. for Station WWQQ-FM, Wilmington, North Carolina, IS MODIFIED, effective **July 15, 1988,** to specify operation on Channel 267C2, in lieu of Channel 266C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Winfas of Belhaven, Inc. and the Joint Request for Commission Action and Termination of

Proceeding filed by Winfas of Belhaven, Inc. and Woolfson Broadcasting Corporation of Wilmington, Inc. IS GRANTED.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-03-04 and West Longitude 77-57-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-260

In the Matter of

Amendment of Section 73.202(b), RM-5728
Table of Allotments,
FM Broadcast Stations.
(Olive Branch, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 29, 1988; Released: June 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission is the *Notice of Proposed Rule Making*, 2 FCC Rcd. 4346 (1987), proposing the allocation of FM Channel 239A to Olive Branch, Mississippi. The *Notice* was issued in response to a petition filed by J. J. Kirk (petitioner). Petitioner filed comments in support of the allotment and indicated his intention to file an application for the channel. No other comments were received.

2. Channel 239A can be allocated to Olive Branch, Mississippi, consistent with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 2.5 kilometers (1.5 miles) northeast of the community.[1] The site restriction will prevent a conflict with Station WVIM-FM, Channel 237A, Coldwater, Mississippi and with Station KHLS, Channel 242C1, Blytheville, Arkansas.[2] In view of the fact that the allocation could provide a first FM broadcast service to Olive Branch, we believe the public interest would be served by a grant of the petitioner's request.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 15, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Olive Branch, Mississippi	239A

4. The window period for filing applications will open on **July 18, 1988,** and close on **August 17, 1988.**

5. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Issue a copy of this *Order* by Certified Mail, Return Receipt Requested, to Sudbury Services, Inc., P.O. Box 989, Blytheville, Arkansas 72315. Sudbury Services, Inc. is the licensee of FM Station KHLS, Blytheville, Arkansas.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 239A at Olive Branch, Mississippi, are 34-58-51 and 89-48-34.

[2] The site restriction will protect both the existing license for Station KHLS, on Channel 241C1, and the construction permit for Channel 242C1 at Blytheville (BMPH-860710IC). However, the site restriction will not protect a currently pending application for Channel 242C at Blytheville (BPH-870224IW), which proposes to move the site for Channel 242C 32 kilometers. In MM Docket 80-90, the Commission provided a 16 kilometer buffer zone, until March 2, 1987, to all Class C stations operating with less than minimum facilities in order to assist them in upgrading their facilities. Therefore, the Blytheville application, because it is beyond its protected buffer zone, is not entitled to protection and was not considered in this rule making.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-190

In the Matter of

Amendment of Section 73.606(b),	RM-5619
Table of Allotments,	RM-6043
Television Broadcast Stations.	
(London and Xenia, Ohio)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 5, 1988; Released: June 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Broadcast Media Services, Incorporated (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 3538 (1987), proposing the allocation of UHF TV Channel 32 to London, Ohio, as the community's first local television service. Petitioner filed comments and reply comments supporting the allotment at London.[2] In addition, Randolph H. Millar (Millar) filed comments and a counterproposal requesting the allocation of Channel 32 to Xenia, Ohio, as its first local television service. [3]

2. Millar states that he will apply for Channel 32, if allocated to Xenia. He notes that Xenia (population 24,653)[4], the seat of Greene County, presently has no local television service or vacant channel allocated to it. Millar contends that the public interest would be better served by allocating Channel 32 to Xenia based on its population, which is more than 3-1/2 times greater than London's. In addition, he states that a Xenia transmitter can be so sited as to allow placement of a strong, possibly city-grade, signal over London, thus also serving the needs of that community.

3. In response, petitioner states that Millar failed to submit engineering data to support his counterproposal, noting the lack of a study showing that Channel 32 can be allocated to Xenia in compliance with the Commission's technical requirements and that it is the only channel available. In addition, it submits that Millar failed to express an intention to apply for the channel, instead only stating that he will "cause an application. . .to be filed." Petitioner also questions Millar's contention that a Xenia Channel 32 station could provide city grade service to both Xenia and London. It states that the Xenia station would have to specify facilities of one million watts (1000 kilowatts) at 750 feet above average terrain in order to provide city-grade service to both communities. Finally, it states that Channel 32 at Xenia requires a site restriction of almost 21 miles from the center of the city. Petitioner argues that the public interest would not be served by allocating a channel which requires such a "severe" site restriction, noting that the allotment at London requires no such restriction. For these reason, petitioner submits that Millar's counterproposal should be dismissed and Channel 32 should be allocated to London.

4. After reviewing the pleadings before us, we find that none of the objections raised by petitioner warrant a denial of Millar's counterproposal. Millar, although using phraseology different than petitioner, has stated his intention to apply for the channel. In addition, while Millar failed to provide a technical study showing the feasibility of a Xenia allotment, we believe that this failure is not fatal. We have confirmed that Channel 32 can be allocated to Xenia in compliance with the Commission's technical requirements. Further, the Commission does not consider a site restriction of 21 miles for a television facility to be excessive or to require the use of extraordinary facilities. Rather, UHF stations are permitted facilities of 1000 kW and antenna heights of 2000 feet above average terrain which allow a city-grade signal of 80 dBu from a distance of 36 miles. Finally, whether or not a Xenia station will provide city-grade coverage over London is of no decisional significance. While the provision of such service to other nearby communities is to be desired, there is no requirement that a station provide city-grade service to any location other than its community of license. Finally, a counterproponent is not required to submit a showing that the channel it seeks is the only channel which can be allocated. However, in this instance, a staff study has shown that Channel 32 is the only channel which can be allocated to either community.

5. London (population 6,958) is the seat of Madison County (population 33,004). Xenia (population 24,653) is the seat of Greene County (population 129,769). London and Xenia are located approximately 30 miles apart and each is without local television service. While both communities appear to deserve a first local television service, a choice must be made since there are no alternative channels available for either community. In evaluating the public interest factors to determine which community should receive a first local television service service, the Commission generally considers (1) population, (2) location, and (3) number of reception services.[5] Here, London is located 28 miles from Columbus, Ohio, and receives service from 9 television stations. Xenia is located 18 miles from Dayton, Ohio, and receives service from 12 stations. Thus, neither community lacks an adequate number of reception services. The differences between Xenia and London with respect to the number of reception services and location, although material, are not sufficiently substantial to outweigh the fact that Xenia has a population greater than three times that of London. Therefore, we believe the public interest would be better served by allocating Channel 32 to the larger community of Xenia, Ohio, since it could provide a first local service to a substantially greater population.

6. Based on the above discussion, we believe the public interest would be served by allocating Channel 32 to Xenia, Ohio, since it could provide a first local television service to the larger community. Channel 32 can be allocated to Xenia in compliance with the Commission's minimum distance separation requirements with a site restriction of 33.4 kilometers (20.7 miles) east.[6] Canadian concurrence in the allotment has been received since Xenia is located within 250 miles of the U.S.-Canadian border. However, on July 16, 1987, the Commmission adopted a temporary freeze on the filing of petitions for new allotments and applications for vacant allotments

where the community is located within the minimum co-channel separation distance to certain metropolitan areas. *See Order*, 52 FR 28346, July 29, 1987. Xenia is located within the proscribed distance to both Cincinnati and Columbus, Ohio, two of the metropolitan areas affected by the freeze. Thus, no applications for Channel 32 at Xenia will be accepted until further notice by the Commission.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 15, 1988,** the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Xenia, Ohio	32

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Xenia, Ohio, has been added to the caption.

[2] Petitioner's late-filed comments were accompanied by a request for their acceptance. Counsel for petitioner states that it was only recently retained and was not able to review the pleadings in this proceeding and prepare comments for filing until two days after the comment deadline. We will accept petitioner's comments for the purpose of reiterating its interest in Channel 32 at London.

[3] Public Notice of the filing of the counterproposal was given on August 10, 1987, Report No. 1671.

[4] Population figures are taken from the 1980 U.S. Census.

[5] *See Sixth Report and Order* on Television Allocations, 41 F.C.C. 148, 167 (1952).

[6] The coordinates for this allotment are North Latitude 39-44-18 and West Longitude 83-32-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-384

In the Matter of

Amendment of Section 73.202(b),	RM-5223
Table of Allotments,	RM-5476
FM Broadcast Stations.	RM-5667
(Lompoc and Orcutt, California)	

ERRATUM

Released: June 3, 1988

By the Deputy Chief, Policy and Rules Division:

On April 8, 1988, the Commission by its Mass Media Bureau released a *Report and Order*, 3 FCC Rcd 1995 (1988), in the above captioned proceeding. In the *Report and Order*, the Commission allotted Channel 294B1 to Lompoc, California, with a site restriction of 11.3 kilometers (7.0 miles) southwest. The dates for the window period for filing applications were inadvertently omitted. Therefore, notice is hereby given that effective **July15, 1988,** the window period for filing applications for Channel 294B1 at Lompoc, California will open on **July 18, 1988**and close on **August 17, 1988.**

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY

File No. AAD 6-1552

Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide Protocol Conversion as an Adjunct to a Basic Packet Switched Network

MEMORANDUM OPINION AND ORDER

Adopted: May 6, 1988; Released: June 1, 1988

By the Commission:

I. INTRODUCTION

1. By a *Memorandum Opinion and Order*, 2 FCC Rcd 2040 (1987), (hereinafter the *Waiver Order)* the Chief, Common Carrier Bureau (hereinafter the Bureau), approved the protocol conversion compliance plan filed by Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (hereinafter referred to collectively as US West). The *Waiver Order* permits US West to provide asynchronous-X.25 and asynchronous-X.75 protocol conversion services jointly with its basic packet switched data transmission service. It permits US West to collocate equipment to provide the protocol conversion and basic services and permits marketing, billing and collection, and installation and maintenance of these services without adhering to the structural separation requirements of the *Computer II rules*.[1] On May 11, 1987, MCI Telecommunication Corporation (MCI) filed a "Petition for Reconsideration" of the Bureau's order. Although entitled a petition for reconsideration, MCI's pleading is addressed to the Commission and asks us to modify the Bureau's decision. It was clearly intended to be an application for review of an action taken pursuant to delegated authority, and we shall treat it as such.[2] For the reasons set forth below, we deny MCI's application.

II. BACKGROUND

2. The *Computer II* rules required the American Telephone and Telegraph Company (AT&T) and (upon the divestiture of the Bell System) the Bell Operating Companies (BOCs) to offer any "enhanced services" on an unregulated basis through subsidiaries separated from their regulated operations. "Enhanced services" includes protocol conversion offerings. [3] Subsequently, in our *Protocols Decision*,[4] we established criteria which would, if met, support waiver of the requirement that protocol conversion offerings be made through separate subsidiaries. Soon thereafter, at the request of the BOCs, we ruled that conversions between the X.25 format and the X.75 formats (used in interconnecting networks) could be treated as a basic service and thus exempt from the separate subsidiary requirement.[5] Several BOCs asked that we waive the *Computer II* separation requirements so as to permit them to provide conversion from asynchronous protocols to X.25 packet-switched network protocols in conjunction with basic packet switching services and using facilities located in their central offices. Asynchronous to X.25 conversion permits the very large number of terminals and other equipment using asynchronous transmissions, including most personal computers, to have access to packet switched networks. In the *Protocol Waiver Order* [6] we determined the public interest would be served by permitting BOCs to offer asynchronous to X.25 protocol conversions using equipment of the central offices of the regulated entities. However, to protect against anticompetitive behavior, we conditioned the waiver on the BOCs meeting certain specified conditions.[7] Of the various requirements set forth in the *Protocol Waiver Order* only one is relevant to the instant petition. The third condition requires that the BOCs provide end users with equal access to their protocol conversion offerings and those of other enhanced service providers.[8]

3. On November 18, 1986, US West filed with the Bureau a request asking that it be found in compliance with the conditions for a collocation waiver and that it be granted a waiver to permit joint marketing, billing, and installation. MCI opposed US West's request and raised a number of objections. Only two of those are relevant here. First, MCI claimed that US West should specify presubscription and allocation procedures addressing the situation where a customer does not specify which interexchange carrier should carry the packet switched data. In reply, US West stated that if a customer did not specify which interexchange carrier should be used, either through a presubscription arrangement or at the time of the call, the call would not be put through. Second, MCI asserted that US West should provide Automatic Number Identification (ANI) of the calling party when packet switched calls are routed to an interexchange carrier. US West replied that it would be willing to make ANI information available, but that such information was not available at the central office where interconnection is made with the packet switched network.

4. In the *Waiver Order*, the Bureau found that US West had satisfied all of the conditions for a waiver set out in the *Protocol Waiver Order*. With respect to MCI's objections to compliance with the third condition, the Bureau stated:

> [W]e agree with US West that it has satisfactorily addressed MCI's concerns about presubscription and ANI. We note, however, that the third condition is intended to ensure equal treatment between the BOC's packet switching services and similar services offered by competitive packet switching providers. The issue that MCI has raised addresses the treatment of interexchange carriers, not the treatment of

packet switching service providers. We conclude, therefore, that US West has complied with condition three of the collocation conditions.[9]

III. THE PLEADINGS

A. MCI's "Petition for Reconsideration"

5. MCI's petition addresses only the portion of the *Waiver Order* dealing with US West's alleged failure to require presubscription and allocation and to provide ANI information to interexchange carriers. MCI states that the *Waiver Order* only found US West's presubscription approach to be acceptable, but " . . . did not specifically state that such a presubscription method was necessary to satisfy, or did satisfy, the Commission's [third condition]."[10] MCI claims that the Bureau's resolution of this issue, as quoted in para. 4, *supra*, is a statement that packet switching providers may be treated differently from interexchange carriers. MCI states that the Bureau gives no rational basis for making the distinction it did between interexchange carriers and packet switching providers, and that the statement is inconsistent with numerous Commission statements that access customers cannot be treated differently because of the type of service they provide.[11] MCI also claims, without elaboration, that the Bureau's statement violates Open Network Architecture principles. Finally, MCI asserts that the Justice Department, in an April 1987 proposed Order to modify the Modification of Final Judgment line of business restrictions, made no distinction between interexchange carriers and information service providers with respect to the provision of exchange access, information access and exchange services for such access. MCI therefore requests us to revise the portion of the *Waiver Order* which, in its view, distinguishes between interexchange carriers and packet switching providers.

6. MCI seeks Commission review of the Bureau's decision not to require US West to provide ANI, asserting that the only reason it is technically impossible for US West to provide ANI information to interexchange carriers is because US West has chosen to configure its packet switching service in such a fashion as to make it impossible. It states that US West does not need to receive ANI information for its packet switched services because it already knows where the call is coming from, and thus it has no incentive to construct its service to pass such information on to its competitors. Configured differently, it would be quite possible for US West to pass ANI information on to interexchange carriers. MCI claims that US West has configured its system so as to provide itself access for its packet switching services over cheaper lines which cannot provide ANI information, which it does not need anyway. MCI asserts that the technical capability for US West to provide ANI information is known to exist, but that US West has failed to make it available at comparable prices. In MCI's view, the concepts of equal access and comparably efficient interconnection mandate that interexchange carriers be able to bill their end users directly, without reliance on the local exchange carrier's (LEC's) recording service. US West should, in MCI's view, structure its service so as to provide ANI information to all interexchange carriers at "comparable prices."[12]

B. US West's Opposition

7. In its May 27, 1987 Opposition, US West states that it has no opinion whether the statement in the *Waiver Order* to which MCI objects is contrary to Commission policy. US West states that consideration of that question should not obscure the fact that it was found to have satisfied the third collocation requirement of the *Protocol Waiver Order* and that MCI has not alleged otherwise. It states that any clarification of the Bureau's statement should be made without modification of the finding that US West has satisfied the third condition.

8. In response to MCI's concerns,[13] US West states that there are two reasons that make it impossible to forward the identity of the originating party in a call making use of a packet switching system. First, US West asserts that the ANI information is not available to US West to pass on to MCI. Originating party information is passed only as far as the entity which prepares the bill for the call, and in no case is this information passed on to the central office serving as an entry port for the packet switched network. US West states that, contrary to MCI's claims, it has not established a system which provides it with billing information unavailable to competitors; the billing information is not available to anyone, including US West. US West states that in any case ANI is at present unnecessary; dial access to the packet switched network is configured in a fashion similar to 800 service, with the terminating party, not the originating party, paying for the call.

9. Second, US West claims that it is unaware of any packet switch capable of passing the ANI information along as part of the (X.75) call setup protocol. International standards would have to be developed to permit ANI to be included in the standard packet protocol. US West reasserts its position that it is technically infeasible to provide the interexchange carriers with ANI, and therefore there is no reason for the Commission to amend the *Waiver Order* with respect to ANI.

IV. DISCUSSION

10. We find that the Bureau properly concluded that US West met the conditions for a waiver specified in the *Protocol Waiver Order* and we consequently will deny MCI's "Petition for Reconsideration." The proceeding before the Bureau, and now properly before us, is limited to US West's compliance with the *Protocol Waiver Order* and whether it should be authorized to provide protocol conversion services pursuant thereto. The Bureau rejected the two points raised in the petition now before us as being irrelevant to the question of whether US West has complied with the waiver conditions. We agree with the Bureau.

11. MCI does not object to the Bureau's finding that its argument concerning presubscription is not relevant in the context of this proceeding. Its petition is limited to an objection to the language in the *Waiver Order* which rejected its presubscription objections. However, the statement in para. 4, *supra*, does not sanction any discrimination between the access provided by the LECs to interexchange carriers and enhanced services providers. The Bureau correctly determined that the third waiver condition requires only that the BOC demonstrate that end-subscriber loop services accessing its enhanced services operations will also be available to customers of other enhanced services providers. The quotation simply pointed out that the *Waiver Order* does not address the relationship between a LEC and an interexchange carrier.

As US West notes,[14] if an interexchange carrier also provides an enhanced service in conjunction with packet switching, it would be afforded the protections established in the *ProtocolWaiver Order* the same as any other competitive enhanced packet service provider.

12. The second point raised by MCI, its inability to obtain ANI information, reflects an apparent dispute between MCI and US West (or between MCI and the BOCs in general) over MCI's inability to obtain such information from the BOCs in a form satisfactory to it. Again, we observe that this is not a compliance issue. It is unclear from MCI's pleading whether that problem is only with US West or if it is with other local exchange carriers as well. If MCI is concerned specifically with US West's access arrangements, it should file a complaint pursuant to §208 of the Communications Act[15] detailing its concerns. If it is concerned with the manner in which interexchange carriers receive subscriber information for calls originating on the Public Packet Switched Network in general, it should raise those concerns in a manner which allows wider participation by interested parties.[16] It would be inappropriate for us to attempt to resolve such broad issues in the limited context of this proceeding, in which the many parties interested in those issues are not participating.

13. In summary, MCI's petition is either an untimely attempt to seek reconsideration of the manner in which carriers must demonstrate compliance with the *Protocol Waiver Order* or an attempt to raise collaterally other disputes it has with US West or other BOCs. If MCI feels that our rules or policies are unsatisfactory, or that it is being improperly treated by the BOCs, it should raise its grievances in an appropriate proceeding. However, it has submitted nothing here to call into question US West's compliance with the terms and conditions established in the *Protocol Waiver Order*.

V. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that MCI's "Petition for Reconsideration", filed on May 11, 1987, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] Section 64.702 of the Commission's Rules and Regulations, 47 C.F.R. § 64.702. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry*), 77 FCC 2d 384 (1980) (*Final Decision*), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[2] In any event, Section 1.106(a)(1) of our Rules provides that a petition for reconsideration of actions taken pursuant to delegated authority either may be acted upon by the designated authority or referred to the Commission.

[3] Section 64.702(a) of the Commission's Rules, 47 C.F.R. §64.702(a).

[4] Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, *Memorandum Opinion and Order and Statement of Principles*, 95 FCC 2d 584 (1983).

[5] Petitions for Waiver (X.25/X.75), *Memorandum Opinion and Order*, FCC 84-561 (released November 28, 1984).

[6] Petitions for Waiver of Sections 64.702 of the Commissions Rules (Computer II), 100 FCC 2d 1057 (1985) (*Protocol Waiver Order*).

[7] As part of our *Third Computer Inquiry*, we have recently modified our regulatory scheme applicable to enhanced services, including protocol conversion services, by substituting nonstructural safeguards for the structural safeguards adopted in the Second Computer Inquiry. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (*Third Computer Inquiry*), 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *recon.* 2 FCC Rcd 3035 (1987), *further recon.* 3 FCC Rcd 1135 (1988), 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.* 3 FCC Rcd 1150 (1988). However, in the *Computer III Phase I Order* we applied the conditions of our *Protocol Waiver Order* to BOC packet- switched services which feature asynchronous/X.25 protocol coversion capabilities as a means of providing "comparably efficient interconnection" (CEI) under our modified regulatory scheme.

[8] 100 FCC 2d at 1100, 1109-10. We explained that under this condition, access to the protocol conversion capabilities of the BOCs and the protocol conversion capabilities of other entities providing that service must be available to end users on a tariffed basis and without discrimination between the BOCs' facilities and those of the other providers. *Id.* at 1109. Our concerns about potential discrimination in access were based in part on the desire that end users with Data Over Voice facilities be able to access a non-BOC enhanced services vendor over those facilities, at their option, on a basis comparable in price, terms and quality to their ability to access the services of the BOC's enhanced services operation. *Id.* at 1111.

[9] *Waiver* Order, 2 FCC Rcd at 2046.

[10] MCI Petition at 2.

[11] *Id.* at 3. MCI cites to the Third Report and Order, MTS and WATS Market Structure, 93 FCC 2d 241, 251 (1983), as an example of such a statement.

[12] MCI Petition at 5. MCI does not explain what it means by "comparable prices."

[13] US West asserts that MCI's petition does not now challenge its presubscription procedures. Rather, MCI only objects to the language in the Waiver Order resolving that issue. Thus, US West does not address the merits of the presubscription issue.

[14] US West Opposition at 5, n. 16.

[15] 47 U.S.C. §208.

[16] While PCI states that "the concepts of equal access and Comparatively Efficient Interconnection (CEI) mandate that [interexchange carriers] have the capability to directly bill their end users without relying on US West recording services," Petition at 6, we believe that this reconsideration proceeding is not the proper context in which to raise these broad generic claims. This proceeding addressed only the applicability to US West of a specific waiver condition, which, by its terms, does not address the billing or recording functions.

Although we could construe MCI's reconsideration petition as a petition for Rule Making on the basis of its claims regarding equal access and CEI, we decline to do so without fuller elaboration of MCI's particular concerns. Regarding MCI's equal access claim, we have specifically found in our Billing and Collection

proceeding that there is sufficient competition in the provision of billing and collection to interexchange carriers to warrant detariffing of LEC provision of those services to such carriers. We also have addressed LEC provision of the recording function in that proceeding. See Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150 (1986), recon. denied, 1 FCC Rcd 445 (1986).

We also note that our CEI requirements of the Th ird Computer Inquiry, which focus on the provision of enhanced services, do not mandate any particular treatment of direct billing by interexchange carriers or of the recording function provided to such carriers. While we would have CEI concerns if US West were making a basic service feature, such as ANI, available to its own enhanced service operations, but not to those of competitors, MCI does not appear to make this allegation and US West specifically denies that this is the case.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-109

In re Applications of

MARK L. WODLINGER File No. BPCT-851120KH

BHC ASSOCIATES, LIMITED PARTNERSHIP File No. BPCT-860110KG

For Construction Permit for a New Television Station Billings, Montana

Appearances

Michael R. Miller, on behalf of Mark L. Wodlinger; and *Lawrence Bernstein* and *F. Joseph Brinig*, on behalf of BHC Associates, Limited Partnership.

DECISION

Adopted: May 12, 1988; Released: June 1, 1988

By the Review Board: BLUMENTHAL and ESBENSEN.

Board Member BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Mark L. Wodlinger (Wodlinger) and BHC Associates Limited, Partnership (BHC)[1] for authority to construct and operate a new commercial television station on Channel 6 at Billings, Montana.[2] These applications, along with four others earlier dismissed, were designated for consolidated hearing on air hazard and standard comparative issues by *Hearing Designation Order*, 51 Fed. Reg. 22,865 (1986). An issue to explore the validity of BHC's putative ownership structure was subsequently added by presiding Administrative Law Judge Richard L. Sippel (ALJ). *Mark L. Wodlinger*, FCC 86M-3665, released December 19, 1986.

2. In his *Initial Decision*, 2 FCC Rcd 6027 (1987) *(I.D.)*, the ALJ resolved the air hazard issue favorably towards each applicant, concluded that BHC was superior overall under the standard comparative issue, and granted BHC's application. He held that although BHC could not be awarded the 100% quantitative full-time ownership integration credit it claimed, that applicant was, nonetheless, entitled to 50% quantitative credit, such credit to be enhanced by future local residence, civic activities, and broadcast experience, the cumulative effect of which was sufficient to outweigh the slight diversification and very slight coverage preferences awarded Wodlinger. *I.D.*, para. 76.

3. The proceeding is now before the Review Board on exceptions and reply briefs filed by both parties, primarily contesting the ALJ's analysis under the standard comparative issue. Both parties also challenge certain of the ALJ's rulings denying petitions for enlargement of the issues. There are no exceptions on the air hazard issues. We have reviewed the *I.D.* in light of the pleadings, the oral argument held February 5, 1988, and our independent examination of the record. We adopt the ALJ's findings and conclusions, except as modified herein, and affirm his ultimate conclusion that BHC is the preferred applicant. As set forth below, however, we have revised key elements of the ALJ's comparative analysis. We turn first to the issues relating to BHC's ownership structure and integration proposal.

4. *Integration of Ownership and Management.* BHC represented in its application filed January 10, 1986 that it was a limited partnership with one "general" and one "limited" partner, each owning 50% of the equity of the partnership. The "general" partner, Thomas A. Curtis, who proposes to be "integrated" into the operation of the station as its full-time general manager, has lived in the Billings area since early 1980 and has pledged to move to Billings in the event BHC's application is granted. In addition, Curtis has extensive broadcast experience and has been active in local civic groups and organizations. The "limited" partner, Daniel W. Coon, is an attorney in the District of Columbia and has represented that he would not have any material role, nor any voting power, in BHC's operation of the station. Curtis and Coon have been business associates for six years prior to their filing for the Billings station, and have been involved in various broadcast-related enterprises. BHC seeks 100% quantitative full-time ownership "integration" credit, enhanced by the attributes noted above and premised on Curtis' participation at the station. In contrast, the competing applicant, Wodlinger, does not propose any ownership "integration," and it here seeks no such credit.

5. As noted in paragraph 1, *supra*, an issue bearing upon BHC's putative ownership structure and integration proposal was added following the October 10, 1986 filing of Wodlinger's petition to enlarge issues. That petition was premised, *inter alia*, on BHC's failure to file a Certificate of Limited Partnership with the state of Montana at the time BHC filed its FCC application. The issue sought to determine whether BHC was constituted as a limited partnership by the date set for the exchange of integration statements (April 25, 1986), whether it was legally qualified to prosecute its application, and whether it was entitled to any "integration" credit. The record under this issue reflects that Curtis and Coon had orally agreed, by December 1985 *(i.e.*, prior to the filing of the FCC application), to the form of a limited partnership under which Coon would have no authority for the day-to-day operations of the station *(I.D.*, para. 23), and that they subsequently executed a two-page written agreement on February 24, 1986 (the day before the "B" cut-off date) setting forth the nature of the partners' business relationship and legal authority (Uniform Limited Partnership Act as adopted by Montana) under which BHC would operate. *Id.* The agreement also included an insulation provision concerning Coon, the "limited" partner, which virtually tracked the insulative provisions enunciated by the Commission in its *Reconsideration Order on Ownership Attribution*, 58 RR 2d 604, 619-620 (1985). *I.D.*, para. 24. A subsequent and more detailed agreement, which is char-

acterized by BHC as an amendment to the February 24, 1986 agreement, was executed on August 8, 1986. *Id.*, para. 37. However, BHC waited until August 1986 before filing with the state its Certificate of Limited Partnership which, because of certain technical deficiencies, was not accepted for filing by the state until September 25, 1986. *Id.*, paras. 17, 53-54.

6. In reaching his ultimate conclusion that BHC could not be treated for comparative purposes as a limited partnership, the ALJ determined that BHC's February 24 document was, in essence, not finalized or sufficiently detailed to comply with Commission requirements. Specifically, he found that the language of the agreement looked to the future and was merely an understanding that Coon and Curtis would form a limited partnership under the laws of Montana, an understanding that only became complete when the more detailed document was executed on August 8. *Id.*, paras. 24-25, 52. The ALJ added that BHC's delay in filing for a Certificate of Limited Partnership until after February 24, and its execution of the August 8 document, provided circumstantial evidence of a later effective date. Alternatively, he noted, even if BHC were recognized as a limited partnership (assuming the validity of the February 24 agreement), that ownership structure was only legally formed on September 25, 1986, the date on which the state accepted BHC's Certificate for filing, and was too late for comparative purposes to merit the full 100% "integration" credit to which BHC would otherwise be entitled, citing *Northland Communications*, 100 FCC 2d 914, 917 (Rev. Bd. 1985)("integration" proposed must be certain and definite on the date proposals are required by the ALJ, here April 25, 1986), *review denied*, FCC 86-106, released March 14, 1986, *aff'd by judgement sub nom. Up North Broadcasting Company v. FCC*, 814 F.2d 774 (1987). *I.D.*, paras. 53-58. The ALJ further held that BHC would be treated as a general partnership entitled only to a 50% quantitative "integration" credit in light of its principals' prior conduct of business affairs on a joint basis, their 50/50 equity split, and Coon's involvement in preparing the February 24 and August 8 agreements. BHC excepts to the ALJ's reasoning and contends that it is entitled to 100% quantitative "integration" credit. Wodlinger, in turn, urges the negative.

7. We affirm the 50% quantitative ownership "integration" credit awarded BHC, but base our holding on reasoning different than that advanced by the ALJ. At the outset, we disagree with his determination that the February 24 document was intended as a mere understanding to form a limited partnership in the future. The document plainly states on its face: " *This . . . will constitute our written agreement* regarding the formation of BHC Associates Limited Partnership . . . ." BHC Exh. 10 (emphasis added). Moreover, both Curtis and Coon testified that they considered the document as final and binding (Tr. 449-450, 575, 581-582); and Coon, an attorney who specializes in commercial law (Tr. 559), and the individual who drafted the document, expressly denied that it was anything other than a final agreement (Tr. 579). Nor are we persuaded by the circumstantial evidence adverted to by the ALJ, *i.e.*, the delay in filing the Certificate of Limited Partnership and the subsequent preparation of a more detailed document on August 8. Coon asserted that the rationale in filing the certificate was to give constructive notice to the world of the limited liability of the limited partners; and that since he had worked closely with Curtis over an extended period of time, he was not concerned about filing the certificate and limiting his liability until they were ready to operate. Tr. 572, 580. He further testified that the August 8 document was only drawn up after communications counsel voiced concern that the limitations on limited partners prescribed by the state statute should be expressed in the agreement itself to eliminate the necessity of the Commission or the parties having to refer to the statute to ascertain those limitations. Tr. 607-608. Thus, neither factor, in our view, provides a basis for rejecting BHC's integration proposal. *See San Joaquin TV Improvement Corp.*, 96 FCC 2d 594, 598-599 (Rev. Bd. 1983) (provisions as here considered "archetypical" limited partnership agreement provisions) (subsequent history omitted).

8. Neither are we in agreement with the ALJ's alternative conclusion that the formation of the limited partnership (as purportedly defined under state law) occurred too late for comparative purposes to justify the award of full quantitative "integration" credit to BHC. We have previously held that the strictures of state law are not necessarily controlling in the Commission's assessment of "integration" proposals. *See Bradley, Hand, and Triplett*, 89 FCC 2d 657, 662-663 (Rev. Bd. 1982) (failure to comply with state corporate law requirement not relevant to Commission's "integration" policies); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 838 (Rev. Bd. 1981)(subsequent history omitted)(same). *See also Signal Ministries, Inc.*, 104 FCC 2d 1481, 1494 (Rev. Bd. 1986)("integration" analysis not complete solely because applicant's organizational structure technically complies with formalities of state law), *review denied*, 2 FCC Rcd 1259 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp.*, Case Nos. 87-1138 & 87-1140 (D.C. Cir. Feb. 8, 1988); *Cotton Broadcasting Co.*, 104 FCC 2d 473, 475-476 (Rev. Bd. 1986)(same). Moreover, Wodlinger has not cited any case, nor are we aware of any, where the failure to file a Certificate of Limited Partnership, by itself, prior to the FCC application filing, "B" cut-off, or "integration" statement dates, was considered disqualifying, or upgrading for comparative purposes. In *Pacific Television, Ltd.*, 2 FCC Rcd 1101, 1102 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1700 (1988), which involved, *inter alia*, a post "B" cut-off filed certificate of limited partnership, the Board concluded that the applicant was a "sham." Other considerations there included: (1) the applicant's executed partnership agreement did not arise for nearly four months after the "B" cut-off date; (2) its alleged "general" partner, pursuant to a subordination clause, had merely a 1% equity interest in the partnership; and (3) the latter played no material role in the applicant's creation. That case is obviously different from the one now before us. *See also Sardis Broadcasting Co.*, 50 RR 2d 1402, 1403 (Med Bur. 1982)(defective partnership agreement under state law considered readily correctable raising no question that applicant would not qualify to do business as proposed). As we held in *Bradley, Hand and Triplett*, 89 FCC 2d at 662:

> [W]here . . . an applicant sets forth a specific integration proposal, does not depart from it, and provides reasonable assurance that it will be carried out, we will credit that proposal.

In the case at bar, BHC has, in our view, demonstrated reasonable assurance that its "integration" proposal will be carried out.

9. However, we cannot award BHC the full 100% quantitative "integration" credit it seeks because the Commission's *Clarification on Ownership Attribution*, 1 FCC Rcd 802, 804 (1986), holds that "the equity interest of limited partners who provide legal representation and counsel to the partnership is attributable" for comparative purposes to the applicant.[3] The Commission's clarification explains that:

> it would be difficult to envision legal services that are more directly related to the media activities of the partnership than those concerning the licensing and operation of broadcasting entities.
>
> * * *
>
> A partner whose contribution to the partnership is in the form of personal services and expertise rather than in the form of a financial investment is the *antithesis* of a passive investor.

Id. (emphasis added). Thus, as a matter of law, the Board must consider Coon to be an "active" principal, and factor his 50% equity interest into our integration calculus; that is, his 50% active ownership interest will not be "integrated" into the management of the station. *See Utah Television Associates, Ltd.*, 102 FCC 2d 1470, 1482 (Rev. Bd. 1985) (applicant's "integration" credit reduced to include non-integrated limited partners who are considered active owners), *review dismissed*, FCC 86I-153, released December 19, 1986.[4] We decline to reduce BHC's integration credit to zero, however, as urged by Wodlinger.[5] First, BHC has not been exposed as a "sham" applicant, *compare Pacific Television, Ltd., supra* (sham applicant not entitled to any ownership "integration" credit); second, all of BHC's real- parties-in-interest are clearly identified, and Coon has not misrepresented his role with the applicant, *compare Susan S. Mulkey*, FCC 87R-72, released Februry 9, 1988, para. 20; third, there has been no comparative upgrading which would unfairly prejudice competing applicants; and, fourth and most importantly, the record persuasively demonstrates that Curtis, with *at least* 50% voting control, will actively participate in the day-to-day operation of the station and provide the "close association" between legal responsibility and day-to-day performance - the rationale underlying the "integration" criterion, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). Thus, BHC - with 50% quantitative "integration" credit - is entitled to a moderate preference over Wodlinger. *See Communications Properties, Inc.*, 92 FCC 2d 45, 48-49 (Rev. Bd. 1982)(moderate preference for 50% vs 0%), *review denied*, FCC 83-320, released July 7, 1983.

10. *Diversification.* BHC was assessed a slight "diversification" demerit based on its media holdings in six low power television stations, four of which are in-state, two others which are close to the border of an adjacent state, and one which is located in Billings itself.[6] The ALJ attributed both Curtis and Coon's ownership percentages to BHC grounded on his earlier findings that the BHC partners conducted their relationship as general partners. *See supra* para. 6. Wodlinger, through himself and derivatively through the attribution of his wife's media interests, was charged with AM and FM stations in Kansas, a second FM facility in Florida, a television station in Colorado, and a low power television station in Texas. *I.D.*, para. 27. In awarding the edge to Wodlinger, the ALJ accorded the most weight to the proximity of the stations to Billings; and on this factor, BHC had a station in Billings and three others also in the same state. He rejected as untimely a commitment by BHC to divest itself of the Billings LPTV facility. *Id.*, para. 65. BHC disagrees with the ALJ's overall "diversification" analysis and particularly with his failure to credit its divestiture commitment regarding the Billings facility. BHC argues that Wodlinger is charged with a 100% interest in all of his media holdings, most of which involve full power stations, whereas the BHC principals have less than a 100% equity interest in three of the LPTV stations: Curtis and Coon each own 29.41%. BHC further argues that Wodlinger's company, Wodlinger Broadcasting of Texas, Inc., which produces a series of video programs entitled "Hit Video USA", is attributable and that when the aggregrate factors are considered – the divestiture commitment for Billings, the minority interests of Curtis and Coon *vis a vis* the 100% interests of Wodlinger, the lesser significance of LPTV stations versus that of full power facilities, and Wodlinger's ownership of "Hit Video USA" – BHC should prevail on the diversification criterion.

11. It is our view that neither applicant is entitled to a "diversification" preference. At the outset, we agree with BHC that its divestiture pledge for the Billings facility was sufficiently "contemporaneous" to be credited. The general rule for non-recognition of other media interests is that if an appliant pledges prior to the "B" cut-off date to divest itself of certain media interests, those interests will not be charged to the applicant nor will such divestiture be considered as comparative upgrading in prejudice to any competing applicant. *See Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 794 (Rev. Bd. 1984)(subsequent history omitted). Media interests acquired after the "B" cut-off date will also not be charged to an applicant if accompanied by a "contemporaneous" pledge to divest. *See Jerome Thomas Lamprecht*, 99 FCC 2d 1219, 1222 (Rev. Bd. 1984)(divestiture pledge made on or before ownership interest is required to be reported under 47 CFR §1.65, *i.e.*, 30 days, generally considered contemporaneous); *review denied*, FCC 88-143, released May 3, 1988.

12. In the instant case, the Billings LPTV station was acquired by BHC on August 25, 1986, subsequent to the "B" cut-off date. Prior to the date the interest was required to be reported under 47 CFR §1.65, however, BHC entered into a settlement agreement with Yellowstone Valley Community Television, Inc., then another applicant in this proceeding, whereby in return for Yellowstone dismissing its application, Yellowstone would receive BHC's low power facility in Billings. A joint petition for approval of the agreement and an amendment reporting this transaction were filed on September 18 and 24, 1986, respectively. Thereafter, on October 15, 1986, shortly after the expiration of the 30 day reporting period, the settlement collapsed, and on October 28, Yellowstone withdrew from the proceeding. BHC filed a petition for leave to amend two days later pledging to divest its interests in the Billings facility.

13. BHC could easily have mooted this entire controversy on timeliness by merely inserting in its September 24 reporting amendment an unconditional declaration that it would divest itself of the Billings facility in the event of a grant of its instant application. To base our determination on such an omission, however, would, in our view, be to unduly elevate form over substance since the overall situation clearly suggests that BHC had already committed itself under the terms of its proposed settlement agreement to giving the station away.[7] Wodlinger was on notice virtually from the moment that BHC received the Billings facility that BHC would timely relinquish the station, and thus is not unfairly prejudiced by removal of the Billings interest from the "diversification" analysis. BHC's grant will be conditioned, however, on the divestiture of the Billings LPTV facility. Second, we agree with the ALJ that the production company producing "Hit Video USA" should have no significant impact on Wodlinger's comparative diversification position. *See generally Morris, Pierce & Pierce*, 88 FCC 2d 713, 724 (Rev. Bd. 1981) (no "diversification" demerit assessed where program production interests are not significant in the subject locale), *review denied*, FCC 83-31, released January 25, 1983. Here, there is no suggestion that the music programs, which are carried on various cable television systems and over certain television broadcast stations, are even viewed in Montana. *I.D.*, para. 28. Finally, the proximity of BHC's in-state and adjacent state facilities are offset by the reduced significance accorded LPTV facilities *vis a vis* full power stations, *see Mark L. Wodlinger*, 101 FCC 2d 762, 769 (Rev. Bd. 1985), *review dismissed*, FCC 86I-93, July 22, 1986,[8] and the disparity in ownership percentages attributable to each applicant, *viz.*, Curtis' and Coon's respective 29.41% interests in five LPTV stations and 50% interests in a sixth *versus* Wodlinger's 100% interest in four full power facilities and one LPTV facility. *See Policy Statement, supra*, 1 FCC 2d at 395 (media interests are considered more significant as they approach complete ownership and control). In sum, the relative differences in the two applicants' "diversification" positions are *de minimis* and entitle neither to a comparative preference.

14. *Comparative Coverage*. Wodlinger was accorded a very slight "comparative coverage" preference predicated on its engineering proposal to provide a first television broadcast service to 3139 persons in an area of 668 square miles and a second service to 729 persons in an area of 493 square miles. *I.D.*, paras. 47, 74-75. In contrast, BHC's proposal would only provide a second service to 70 persons residing in a 48 square mile area. *Id.*, para. 47. In determining that the preference was a very slight one, the ALJ stated that the number of persons covered and size of areas were not very large and that Wodlinger had also failed to prove that the significance of four existing television services to an undefined part of the parties' contours was not substantial. *Id.*, para. 75. Wodlinger contends in its exceptions that the numbers involved warrant a larger preference. BHC, on the other hand, charges that any coverage preference here would constitute impermissible upgrading since Wodlinger's putative coverage advantage was only secured after the hearing was over.

15. We agree with BHC that Wodlinger is not entitled to any "comparative coverage" preference. It is well settled Commission policy that applicants will not be allowed to amend their applications in a manner that would improve their comparative positions after the period allowed for the filing of amendments as of right has expired, *i.e.*, the "B" cut-off date. *See generally Alexander S. Klein, Jr.*, 86 FCC 2d 423, 434 (1981). They will be permitted, however, to restore, by amendment, lost comparative credit when such an amendment is necessitated by extrinsic circumstances beyond the control of the applicant. Thus, for example,in *Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730, 733 (1986), where an applicant had "reasonable assurance" that its original transmitter site proposal would not pose a hazard to air navigation, but the Federal Aviation Administration (FAA) subsequently and unexpectedly withdrew its approval, that applicant was permitted to obtain an alternative antenna site and was credited for comparative purposes with a coverage factor no greater than its *original* proposal. Here, it is apparent from a recitation of the facts below that Wodlinger's efforts to seek a comparative coverage preference were grossly untimely; and that even if timely, "reasonable assurance" of an acceptable transmitter site came too late to merit a coverage preference.

16. Wodlinger originally proposed a tower 387 feet above ground in its application filed November 20, 1985. There is no dispute that the originally proposed 387 foot tower height was acceptable to the FAA, and that upon a timely threshold showing, Wodlinger would have received appropriate credit upon adducing a demonstrated coverage superiorty. Wodlinger, however, never sought any credit based on that original proposal. Instead, on February 24, 1986, the day just prior to the "B" cut-off date, Wodlinger drastically amended his application to increase his tower height to 1259 feet above ground level. Thereafter, at the first Prehearing Conference held June 3, 1986 for the announced purpose of discussing the designated and proposed issues and the evidentiary scope of the proceeding, *see Order Prior to Prehearing Conference*, FCC 86M-1267, released April 11, 1986, the ALJ specifically announced that there was no "areas and populations" issue to be tried in this proceeding, and excused counsel for the Mass Media Bureau from participating in the proceeding. Tr. 4. Wodlinger's counsel, although present, remained silent and made no effort to advise the parties that Wodlinger intended to seek a coverage preference based on his "B" cut-off date proposal. *Id.* In any event, the matter would appear to have been mooted on August 21, 1986, when Katherine G. Paul, Airspace Technical Specialist at the FAA's Seattle, Washington regional office informed Wodlinger's engineer, Robert Purcell, by telephone, that the 1259 foot proposal was unacceptable and would have to be lowered by 692 feet. (*See* FAA Form 1360-33 containing Ms. Paul's handwritten notes of August 21 conversation included in documents filed by BHC on March 4, 1987). In listing various options other than a lower tower site, she suggested that Wodlinger could hire a consultant to help find a new site. *Id.*

17. Notwithstanding the FAA's explicit objection, Wodlinger exchanged hearing exhibits on the following day, August 22, 1986, proposing for the first time to press for a "comparative coverage" preference predicated on the areas and populations that would be served by its 1259 foot proposal. *I.D.*, para. 73. Subsequently, at a second Prehearing Conference held on September 19, 1986, attended by counsel for the Mass Media Bureau, the ALJ, after hearing objections registered by opposing parties (including the Media Bureau), declined to make a final ruling on the propriety of Wodlinger's "comparative coverage" claim, specifically noting Wodlinger's lack of FAA approval and his failure to coordinate his engineering

exhibit with either the Bureau or opposing counsel. Tr. 67-68. Bureau Counsel objected to the untimeliness of Wodlinger's exhibit and coverage claim, complaining that there had been no opportunity for FCC engineers to examine or comment on any threshold showing. Tr. 54. In addition, counsel for Comanche, then a party to the case (*see supra* note 2), correctly observed that it was totally speculative that Wodlinger could ever obtain FAA approval on its unrealistic tower height, since another applicant, Yellowstone Valley Community Television, Inc., proposing a lower high tower *(i.e.*, 1059') in the same vicinity (approximately 950' away) had been informed by the FAA to substantially reduce its proposed tower height or face FAA rejection. Tr. 55.

18. At the hearing commencing September 22, 1986, Wodlinger testified that he had spoken with a Ms. Paul of the FAA within the previous month and had been told that, although there were some preliminary concerns with the proposed tower height, nonetheless, with the assistance of an air specialist, the FAA might approve his 1259 foot proposal. Tr. 205-206. Wodlinger denied that he was told that the FAA had reached a decision that the tower height was unacceptable. Tr. 207. It is worth noting at this juncture that BHC supplied in its pleading filed February 9, 1987 a copy of a memorandum prepared by its counsel, summarizing his conversation with Ms. Paul on January 29, 1987, wherein counsel states that Ms. Paul explained that the FAA had not sent a letter to Wodlinger concerning the specifics of its problems with the tower height, because she had already provided them to Wodlinger's engineer. In any event, on the last day of hearing (October 28, 1986), Wodlinger's counsel advised the ALJ and opposing parties that Wodlinger would be filing an amendment in the near future requesting permission to specify a new site, but that there would not be any substantial change in the coverage Wodlinger had previously proposed. Tr. 626-627.

19. The Wodlinger amendment was filed on November 24, 1986, and argued that "good cause" had been established since Wodlinger had not received a notice from the FAA until November 1, 1986 advising that his 1259 foot tower would pose a hazard to air navigation. In the amendment, though, Wodlinger proposed a *higher* tower height *(i.e.*, 1279') at a *new* site located approximately 0.7 miles away from the original location. The ALJ rejected that amendment for lack of "good cause." *Memorandum Opinion and Order*, FCC 86M-3620, released December 15, 1986. In so doing, he observed in paragraph 8 of his *Order* that if Wodlinger should ever find an optimum tower site, Wodlinger would seek to introduce evidence of superior coverage, but that the time had long expired to consider comparative coverage as an additional issue in this case. Thereafter, at a Posthearing Conference held December 16, 1986, counsel for Wodlinger indicated that the applicant was inclined to go back to its *original* site and lower his tower height to 549 feet above ground level. Tr. 636. Counsel stated that the applicant would also seek permission to submit evidence concerning the coverage at that height, assuming that its amendment was accepted. *Id.* The ALJ speculated that Wodlinger could file an amendment if it felt the need to do so and address the question of comparative coverage, but that he did not think such evidence was appropriate in this case and that Wodlinger could anticipate that his amendment would be rejected. Tr. 637-638. The ALJ gave Wodlinger until December 24, 1986 to seek to amend. Tr. 656-657.

20. On December 24, 1986, Wodlinger filed his third amendment, proposing a tower height of 549 feet above ground level at his original site, representing that the new tower height would provide a first and second television service to populations of 3139 and 729, respectively, and seeking a comparative preference. But the ALJ denied the amendment for lack of "good cause," ruling, however, that the record should contain the comparative coverage evidence to obviate the necessity of a remand. *Memorandum Opinion and Order*, FCC 87M-432, released February 27, 1987. He issued an accompanying *Order* (FCC 87M-433) affording opposing parties an opportunity to submit their own coverage data or meet with Bureau counsel to submit a joint submission of comparative data, warning that in the absence of a rebuttal showing, it would be presumed that Wodlinger's coverage was superior to that of BHC. No rebuttal showing was filed.

21. Proceeding on representations in Wodlinger's December 24, 1986 petition for leave to amend that any delay in receiving site approval was caused by an FAA backlog and that Wodlinger had engaged an air space consultant recommended by the FAA itself to develop alternatives to make its 1259 foot tower acceptable before it was ultimately rejected in late October 1986, but unaware of the true facts now before us, the Board reversed the ALJ's ruling. *Memorandum Opinion and Order*, 2 FCC Rcd 3196 (Rev. Bd. 1987). However, the Board left to the ALJ to decide, in the first instance, the question of whether Wodlinger should be permitted to introduce evidence as to his alleged comparative coverage superiority. Upon receipt of the Board's ruling, and having determined that notice had been given to opposing parties to rebut Wodlinger's coverage data and that no comments had been filed, the ALJ, citing *Jaco, Inc.*, 18 FCC 2d 677 (Rev. Bd. 1969), accepted Wodlinger's coverage representations and awarded the very slight coverage preference mentioned above.

22. We need not, and will not, revisit our earlier (and quite possibly erroneous) ruling concerning Wodlinger's December 24, 1986 amendment. *See* 47 CFR §1.301 (b) (2) (disposition of appeals are generally final if considered on merits).[9] We note in passing, however, that the chronology recited above raises serious questions concerning the accuracy of Wodlinger's earlier testimony on his 1259 foot proposal, which, in our view, would necessitate further evidentiary hearing if Wodlinger were the preferred applicant in this proceeding.[10] We need not pursue this matter any further, however, since Wodlinger's chances of prevailing in this proceeding vanished anyway with the disappearance of its coverage preference. As noted above, we conclude that Wodlinger's efforts in seeking a "comparative coverage" preference were grossly untimely. In this regard, we must depart from the ALJ's reading of *Jaco*. Although that case stands for the proposition that an ALJ has discretion to authorize the adduction of coverage evidence when convinced that a threshold showing of a substantial difference between the applicants' coverage area exists, that discretion is not unlimited and must be exercised in a reasonable manner to minimize disruption to the orderliness of the proceeding and avoid unfair prejudice to the opposing parties. Thus, the Board noted in *Jaco* that the ALJ's authority to accept such evidence was founded on the view that a threshold showing could be made during the prehearing conference, thereby expediting the hearing process. Here, the confusion and unfairness to the opposing parties caused by the late sub-

mission of Wodlinger's engineering exhibit is reflected by the parties understandable reluctance to incur additional expenses after the hearing had terminated to retain an engineer to analyze the accuracy of Wodlinger's engineering data. Both opposing parties then still in the proceeding declined to conduct such a study and Wodlinger's calculations were therefore never tested. It is incumbent upon an applicant seeking a comparative preference to make a showing demonstrating its superiority in a timely manner. Wodlinger was silent as to his coverage claims at the Prehearing Conference called specifically to define the evidentiary scope of the proceeding, and he cannot now complain if a preference is not awarded.

23. Even if Wodlinger's claim for a preference were timely, however, he would still not be entitled to a preference since, in light of the FAA's explicit warning to Wodlinger that his 1259 foot height was unacceptable, Wodlinger did not possess "reasonable assurance" of a viable tower site until after the hearing terminated and he never claimed any coverage superiority from his *original* 387 foot tower height. An air hazard issue was also designated against BHC, but its initial site *was* approved by the FAA. To reward Wodlinger's gamesmanship *after* FAA rejection of *two proposals* over a competitor whose site was in compliance from the outset would be unfair to those applicants duly complying with our rules.

24. *Petition to Enlarge Issues.* Wodlinger excepts to the ALJ's failure to add a misrepresentation/ lack of candor issue against BHC based on BHC's representations throughout the prosecution of its application that it was a limited partnership and on Curtis' testimony taken at the September 23 hearing session concerning the filing of BHC's Certificate of Limited Partnership with the state. The ALJ added an issue to explore the nature of BHC's organizational structure, *see supra* para. 5-9, but declined to order a further inquiry into alleged misrepresentations/lack of candor after listening to the testimony of both Curtis and Coon. We agree with that ruling. The underlying facts as to BHC's organizational structure were fully ventilated at hearing; and the ALJ, who observed the testimony of the witnesses, concluded that any possible lapse in Curtis' testimony [11] did not rise to the level warranting an issue. *See Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (1986)(ALJ's judgment as to credibility of witnesses' testimony entitled to great weight).

25. ACCORDINGLY, IT IS ORDERED, That the motion to strike reply of Mark L. Wodlinger, filed December 7, 1987 by BHC Associates, Limited Partnership IS DENIED; that the petition for leave to amend filed December 28, 1987 by BHC Associates, Limited Partnership IS GRANTED, and the amendment IS ACCEPTED; that the petition for leave to amend filed February 29, 1988 by Mark L. Wodlinger IS GRANTED, and the Amendment IS ACCEPTED; and that the requests for official notice filed February 11 and April 13, 1988 by BHC Associates, Limited Partnership and February 2, 1988 by Mark L. Wodlinger ARE GRANTED.

26. IT IS FURTHER ORDERED, That the application of BHC Associates, Limited Partnership (File No. BPCT-860110KG) for a construction permit for a new television station in Billings, Montana IS GRANTED subject to the condition that Thomas Curtis and Daniel Coon divest themselves of all interests in low power television station K25BP, Billings, Montana, and the application of Mark L. Wodlinger (File No. BPCT-851120KH) IS DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] BHC amended its application on December 22, 1987 to reflect a change of its name from BHC Associates to BHC Associates, Limited Partnership. *See Order*, FCC 87M-041, released January 8, 1987.

[2] By *Order*, 3 FCC Rcd 698 (Rev. Bd. 1988), *recon. denied*, FCC 88R-20, released April 1, 1988, the Board dismissed Comanche Enterprises' application after the application had been denied by the *I.D.* and no exceptions had been filed by Comanche.

[3] In *Independent Masters, Ltd.*, 104 FCC 2d 178, 189 n. 25 (Rev. Bd. 1986) the Board stated that it would not literally apply new limited partnership standards to applicants formed prior to the adoption of those newer standards. *See also Chester Associates*, 2 FCC Rcd 2029, 2031 n. 9 (Rev. Bd. 1987). However, given the absolute tenor of the Commission's language relating to lawyers as "limited" partners in its clarification of *Ownership Attribution*, the Board believes that it may not now hold that an attorney-principal who actively participated in the applicant's most basic business affairs can be regarded as a "passive" investor. The Commission has formulated a conclusive presumption in this regard, and the Board may not act in a manner inconsistent with this agency-created rule of law. *See also infra* note 4.

[4] In holding that, pursuant to the Commission's latest clarification of it's *Ownership Attribution* policies, attorneys who perform primary legal services for an applicant, a permittee, or a licensee are conclusively presumed to be "active" principals even though identified as "limited" partners, *see id.*, 1 FCC Rcd at 804, we recognize that we must necessarily touch upon *Victory Media, Inc.*, FCC 88-134, released April 12, 1988, 3 FCC Rcd (1988), where the Commission permitted a counsel of record who held "non-voting" stock in an applicant to be considered a "passive" principal. In that case, communications counsel Susan M. Jenkins and her husband, Ernest T. Sanchez, together owned 85% of the total equity of Victory Media, one of the three competing applicants for a Katy, Texas television station. Despite the fact that Jenkins obviously performed many legal services for her application, and might - under the narrow *Ownership Attribution* tenet here under discussion - be conclusively presumed to be an "active" principal, thus requiring inclusion of her equity interest (and that of her husband) in any ownership "integration" calculus, Victory Media was permitted to *exclude* the stock interests of the two attorneys for purposes of computing that applicant's quantitative "integration" factor, thereby allowing Victory Media to claim a 100% *effective* quantitative "integration" factor for the *actual* "integration" of only its 15% principal, Virginia E. Mampre. There is no question that attorneys Jenkins and Sanchez were very much actively involved in Victory Media's basic corporate affairs, the Commission noting that "Sanchez arranged for Victory's financing and Jenkins acted as its legal counsel." *Victory Media, supra*, at para. 9. And, there is no question that the Commission has held that, as a matter of law, attorneys who provide legal services (at least insofar as they are identified as "limited" partners) cannot be regarded as merely "passive" principals. In other words - *pace* Brendan Sullivan - lawyers simply cannot be expected to sit as "potted plants" in the affairs of a client. *A fortiori*, when the lawyer is simultaneously an equity

owner of the client entity, "passivity" - in the Commission's view - is all but impossible. Generally speaking, the Commission's policy in this respect seems eminently reasonable.

The only distinction between Coon in the case at bar and Jenkins in *Victory Media* is that, while Coon is here denominated a "limited" partner of BHC, Jenkins' equity in her *Victory Media* application took the form of "non-voting" stock. As stated above, we are here estopped by the Commission's *Ownership Attribution* clarification from considering BHC's Coon to be a "passive" principal. *See* 1 FCC Rcd at 804 ("A partner whose contribution to the partnership is in the form of personal [legal] services . . . is the antithesis of a passive investor"). Whether the Commission's conclusive presumption that "limited" partner attorneys who provide legal services are, almost by definition, "active" principals also applies to to attorneys holding their particular equity interest in the form of "non-voting" stock shares (rather than "limited" partnership shares) is a question not expressly addressed in the Commission's several *Ownership Attribution* orders. Nor does *Victory Media* assist us here, since this specific matter appears to have been neither raised by exceptions nor discussed in that case. However, the Board cannot offhand discern any principled legal basis for treating "limited" partner attorneys as conclusively "active" principals, while treating in precisely the opposite fashion attorney principals of corporate applicants, especially in light of the Commission's underlying reasoning in its clarification order. Accordingly, unless and until further Commission guidance on this point is available, the Board will treat uniformly the ownership interests of attorneys who perform legal services for an applicant: both classes of attorneys (non-voting" "stockholders as well as "limited" partners) will be conclusively regarded as "active" principals for purposes of all of our various comparative analyses.

[5] Wodlinger urges that BHC be disqualified, citing *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); or, alternatively, that BHC's quantitative integration credit be reduced to zero, citing *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181 (Rev. Bd. 1986)(subsequent history omitted). Wodlinger's reliance on *Dutchess Communications Corp., supra*, at 254, for disqualifying BHC is misplaced. Although that case asserts as a general proposition that "those filing an application . . . be *ready, willing*, and *able*, " that language should not be interpreted to preclude last minute adjustments. *See generally Cuban-American Limited*, 2 FCC Rcd 3264, 3265 (Rev. Bd. 1987)(ALJ practice of accepting *until close of record* FAA determination of no hazard). The second case cited by Wodlinger, *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd at 186-187, as support for diminishing BHC's quantitative integration credit to zero is also inapposite. There, the applicant's ownership structure prior to the "B" cut-off date was demonstrated on the record by an unexecuted memorandum of understanding to be used as a basis for entering a limited partnership. The Board found that until a binding limited partnership agreement was signed, the structure was as inchoate as any other oral understanding. Here, there was a timely executed binding written agreement.

[6] The ALJ recognized BHC's commitment to divest itself of its full power stations, and also found its Oregon LPTV facility to be *de minimis*. *I.D.*, para. 65 & n.17.

[7] The fact that the mechanism for facilitating the transfer of the station from BHC to Yellowstone was an option to acquire the station (for 1) is not pertinent to our determination since the September 24 amendment (filed before the collapse of the settlement) establishes that the parties' intention was to give the station to Yellowstone. (". . . agreement providing, *inter alia*, that Yellowstone would receive the LPTV station as consideration for dismissal of its application . . ." BHC Petition for Leave to Amend, filed September 24, 1986, at 2.)

[8] There, we iterated the Commission's observation in *Low Power Television* Service, 51 RR 2d 476, 515 (1982) that the "concern for anticompetitive effects is lessened where the stations are [like LPTV] both secondary *[i.e.*, may not cause interference to full service stations and are subject to interference from them] and inherently limited in their coverage potential."

[9] An apt judicial observation comes readily to mind, however:

> the matter does not appear to appear to us now as it appears to have appeared at the time.
>
> McGrath v. Kristensen, 340 U.S. 162, 178 (1950)(Jackson, J. concurring).

[10] BHC here argues that the ALJ erred in failing to add as basic issue to explore Wodlinger's conduct regarding his transmitter site selections. In light of Wodlinger's disqualification here, we need not address BHC's other allegations of misconduct.

[11] When asked whether BHC's certificate of limited partnership had been filed with the state, Curtis responded narrowly: "Yes they've been prepared and filed." Tr. 275. Although we do not condone his failure to further note that the state had also, by that time, rejected the certificate for filing (on technical grounds), we are aware that Curtis had been previously admonished to confine his responses to the questions asked. Tr. 250,253. Standing alone, there is no basis for a misrepresentation/lack of candor issue. *Cf. Cima Broadcasting Ltd*, 60 RR 2d 464, 467 (Rev. Bd 1985)(subsequent history omitted).

[12] The Hearing Designation Order further directed in n. 1 that the grant shall be subject to the outcome of the rule-making proceedings in MM Docket No. 82-276 where Petitions for Reconsideration against allocation of Channel 6 to Billings are being considered.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI
TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File No. E-88-45
File No. E-88-53

SOUTHERN BELL
TELEPHONE AND
TELEGRAPH CO.

and

SOUTH CENTRAL
BELL TELEPHONE CO.,
Defendants.

ORDER

Adopted: May 20, 1988; Released June 1, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On February 9, 1988, MCI Telecommunications Corporation (MCI) filed the above-captioned formal complaints, alleging that the defendants' earnings for interstate access services for the period October 1, 1985, through December 31, 1986, exceeded the authorized rate of return established by the Commission in *Authorized Rates of Return for Interstate Services for AT & T and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, No. FCC 85-257 (released September 30, 1985), *modified on recon.*, FCC 86-114 (released March 24, 1986), further recon., FCC 86-544 (released Jan. 14,1987), vacated in part and remanded, American Telephone and Telegraph Co. v. FCC, No. 85-1178, slip op. (D.C. Cir. January 22, 1988). The defendants denied such allegations and moved to dismiss the complaints. On May 11, 1988, MCI filed a motion stating that it does not intend to prosecute the matters in controversy at this time and requesting that the complaints be dismissed without prejudice.

2. On the basis of the statements contained in the complainant's motion, we conclude that there are no longer issues in controversy and the proceedings should be terminated.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the motion to voluntarily dismiss filed by MCI Telecommunications Corporation on May 11, 1988, IS GRANTED and these proceedings ARE HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T
COMMUNICATIONS,
Complainant,

v. File No. E-88-22
File No. E-88-29

PACIFIC BELL
TELEPHONE COMPANY,
INC.,

and

WISCONSIN BELL,
INC.,
Defendants.

ORDER

Adopted: May 20, 1988; Released: June 1, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 20, 1987, AT&T Communications (AT&T) filed the above-captioned formal complaints, alleging that the defendants' earnings for interstate access services for the period October 1, 1985 through December 31, 1986 exceeded the authorized rate of return established by the Commission in *Authorized Rates of Return for Interstate Services for AT&T and Exchange Telephone Carriers*, CC Docket No. 84-800, Phase I, FCC 85-257 (released September 30, 1985) (*Phase I Order), modified on* recon., FCC 86-114 (released March 24, 1986), further recon., FCC 86-544 (released Jan. 14, 1987). At the request of AT&T, service of the complaints was deferred pending resolution of an appeal to the United States Court of Appeals for the District of Columbia Circuit of the automatic refund enforcement rule adopted in the Phase I Order. On January 22, 1988, the Court remanded the case to the Commission for further consideration. American Telephone and Telegraph Co. v. FCC, No. 85-1178, slip op. (D.C. Cir. January 22, 1988). Subsequently, on May 13, 1988, AT&T submitted letters to the Commission stating that the parties had satisfactorily resolved the matters in controversy and requesting permission to withdraw the complaints with prejudice.

2. On the basis of the statements contained in the complainant's letters, we conclude that there are no longer issues in controversy and the proceedings should be terminated. 3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaints ARE DISMISSED with prejudice and these proceedings ARE HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Applications of

PAGE AMERICA OF ILLINOIS, INC. — File No. 23178-CD-P-85

for new Public Land Mobile Service facilities to operate on 454.525 MHz at Minneapolis, Minnesota

and

SPECTRATEL, INC. — File No. 24586-CD-P-85

for new Public Land Mobile Service facilities to operate on 454.525 MHz at Minneapolis, Minnesota

and

CONTACT COMMUNICATIONS INC. — File No. 24592-CD-P-85

for new Public Land Mobile Service facilities to operate or 454.525 MHz at Minneapolis, Minnesota

and

B. L. Hill d/b/a ANSWER MINNESOTA — File No. 22209-CD-P-85

for new Public Land Mobile Service facilities to operate on 454.525 MHz at Minneapolis, Minnesota

MEMORANDUM OPINION AND ORDER

Adopted: May 20,1988; Released June 1, 1988

By the Chief, Mobile Services Division:

1. On May 15, 1985, Page America of Illinois, Inc. (Page America) filed an application to establish a two-way facility operating on 454.525 MHz at Minneapolis.[1] B.L. Hill d/b/a Answer Minnesota (Answer Minnesota) had previously filed an application for a two-way channel on 454.425 MHz in Minneapolis, and amended that application on June 13, 1985 to specify 454.525 MHz instead. Page America and Answer Minnesota entered into a frequency sharing agreement which was filed with the Commission on September 25, 1985.[2] A lottery was held on September 27, 1985, that included the applications of Spectratel, Inc. (Spectratel) and Contact Communications, Inc. (Contact).[3] By *Public Notice*, mimeo 1148 (released November 29, 1985), the Commission announced that Page America's application was selected first in the lottery and that Spectratel, Contact, and Answer Minnesota were subsequently selected, in that order. On December 10, 1985 Spectratel filed a Petition to Set Aside Lottery Results. Answer Minnesota and Page America filed separate pleadings in opposition to Spectratel's petition. For the reasons set forth below, we will deny Spectratel's petition.

2. In its petition, Spectratel argues that Page America and Answer Minnesota improperly benefitted from cumulative chances in the September 27 lottery, because the sharing agreement had the practical effect of entitling both signatories to a construction permit for the same frequency. Spectratel contends that the applications of Page America and Answer Minnesota should have been regarded as a single proposal with one chance of prevailing, while the remaining two applicants, Spectratel and Contact, should have received one chance each. Spectratel thus states that a new lottery should be held in which Page America and Answer Minnesota would be deemed to have submitted a single, joint proposal.

3. In its Opposition, Page America argues that the sharing agreement did not operate to afford cumulative chances to the signatories. Page America states that separate construction permits for the same frequency would only be issued to itself and to Answer Minnesota if they were the first two selected in the lottery. However, since that was *not* the outcome of the lottery, Page America (as the first ranked applicant) anticipates the issuance of a single construction authorization in its name only, and that the other three applications including that of Answer Minnesota will be dismissed. Thus Page America maintains that neither it nor Answer Minnesota enjoyed cumulative chances in the lottery, and that its application should therefore be granted.

4. Answer Minnesota raises similar points in its pleading, noting that the original sharing agreement did not contemplate other parties entering the lottery, and that the addition of Spectratel and Contact "all but completely abrogated the settlement agreement, unless Page America and Answer Minnesota were selected first and second." Answer Minnesota also challenges the propriety of Spectratel's petition, arguing that it is actually a petition for reconsideration of the lottery designation order of October 23, 1985, and as such should be dismissed because it was not timely filed. Answer Minnesota notes that Section 1.106(f) of the Commission's Rules requires petitions for reconsideration to be filed within 30 days of the final Commission action, and that Spectratel should have filed its petition prior to November 26, 1985 rather than waiting until December 10 of that year.[4]

DISCUSSION

5. We agree that Spectratel's petition is untimely. Upon seeing all four names on the lottery order of October 23, Spectratel was on notice that each of the four applicants would have equal chances in the lottery. Spectratel's pleading is therefore challenging the designation order itself, and as such should have been filed within thirty days of that notice.

6. Nonetheless, we will address Spectratel's petition because of the issues presented therein. Page America and Answer Minnesota entered into the frequency sharing agreement before the Spectratel and Contact applications were included in the lottery. Both parties to the sharing agreement indicated that it was intended to alleviate the need for a lottery, as they reasonably believed that they were the only two applicants in the lottery pool. Since Page America was selected first, it is the only applicant entitled to a construction authorization, and the remaining three will be dismissed. Clearly, there has been no cumulation of probabilities as Spectratel asserts, and the applications of Page America and Answer Minnesota were properly regarded as separate proposals in the lottery.

7. Accordingly, for the foregoing reasons, IT IS ORDERED, that the application of Page America of Illinois, Inc., File No. 23178-CD-P-85 is GRANTED.

8. IT IS FURTHERED ORDERED, that the Petition to Set Aside Lottery Results filed by Spectratel, Inc. is DENIED.

9. This order is issued under Section 0.291 of the commission's Rules and is effective on its release date. Petitions for Reconsideration under Section 1.106 or Applications for Review under Section 1.115 may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley, Chief
Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The application originally was filed under the name of Page America Network, Inc. By amendment filed February 22, 1988, the applicant's name was changed to Page America of Illinois, Inc.

[2] The sharing agreement provided for the issuance of two construction authorizations, one in Page America's name, and the other in Answer Minnesota's name.

[3] Spectratel and Contact originally filed applications to construct and operate on 454.425 MHz at Minneapolis. Their applications were included in a lottery held on July 29, 1985. Neither of those applications were selected in that lottery. Accordingly, both applicants then timely amended their applications and were included in the lottery for the 454.525 MHz station at Minneapolis.

[4] Answer Minnesota also maintains that the applications of Spectratel and Contact were unacceptable for inclusion in the lottery, and so alleged in separate petitions to dismiss those applications. We will not address these alegations since the issues are moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-135

In the Matter of

Height and Power Increases in the Public Land Mobile Radio Service — RM-5555

ERRATUM

Released: June 1, 1988

On March 23, 1988 the Commission released a *Notice of Proposed* Rulemaking (FCC 88-118) in the captioned proceeding. Because this document inadvertently was omitted from the Federal Register, the comment and reply comment dates hereby are corrected to read June 23, 1988 and July 8, 1988 respectively.

In addition, this Erratum clarifies that the proposed amendment of Section 22.117 pertains only to the introductory text of paragraph (b)(1), and that subparagraphs (b)(1)(i) and (b)(1)(ii) remain unchanged.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 1, 1988

AVAILABILITY OF FCC RULES IN LOOSE-LEAF FORM

The Commission now has available, through the Government Printing Office's Superintendent of Documents, the loose-leaf form of its rules. Below is a list of Volumes and Parts, together with stock numbers and prices as quoted by GPO. While a previous notice announced the availability of Volume I (containing Parts 0, 1, and 19) and Part 13, that information is repeated here for the convenience of the reader.

PUBLICATION	STOCK nO.	PRICE
Volume I (Parts 0,1,and 19)	004-000-00460-4	9.00
Volume II (Parts 2,5,15,and 18)	004-000-00459-1	11.00
Volume III (Parts 73 and 74)	004-000-00471-0	17.00
Volume IV (Parts 90 and 94)	004-000-00474-4	11.00
Volume V (Parts 21,22,23,and 25)	004-000-00462-1	10.00
Volume VI-B (Parts 41-43)	004-000-00463-9	2.25
Volume VII (Parts 61-69)	004-000-00462-1	10.00
Volume VIII (Parts 76 and 78)	004-000-00473-6	4.00
Part 13	004-000-00458-2	1.00
Part 17	004-000-00461-2	1.50
Part 80	004-000-00475-2	6.00
Part 87	004-000-00466-3	3.25
Part 95	004-000-00467-1	2.00
Part 97	004-000-00468-0	3.00
Part 99	004-000-00469-8	1.25
Part 100	004-000-00470-1	1.00

Further ordering information may be obtained directly from the GPO Bookstore at (202) 783-3238. Volume VI-A, which concerns the Uniform System of Accounts rules, has not yet been completed for publication in order to include significant changes which were not effective until January 1, 1988. A Public Notice will be issued announcing the availability of this Volume in the future.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

May 18, 1988

B. Dwight Perry, Esquire
Henry M. Rivera, Esquire
Michelle K. Rusk, Esquire
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037

Released: May 18, 1988

In re:

VETTER COMMUNICATIONS COMPANY — File Nos.: BAL-871218GO, BALH-871218GP

Dear Messrs. Perry, Rivera and Ms. Rusk:

This refers to the application for Commission consent to the assignment of the licenses of Stations WQXY(AM) and WQXY-FM, Baton Rouge, Louisiana, from Encore Communications Associates, L.P. (Encore) to Vetter Communications Company (Vetter).

Vetter is the licensee of UHF television station WVLA-TV, serving the Baton Rouge market. Therefore, the application to acquire the AM/FM combination in Baton Rouge is subject to the Commission's one-to-a-market rule, 47 U.S.C. Section 73.3555(b), which generally prohibits common ownership of radio and television stations in the same market. However Note 4 to that rule provides that where existing or proposed UHF television stations are involved, the applications will be considered by the Commission on a case-by-case basis in order to determine whether common ownership, operation or control of the stations in question would be in the public interest. Applicants state that the Note 4 exception applies, since acquisition of the AM/FM combination will result in economic benefit to a UHF station.[1]

Vetter maintains that although WVLA-TV is an NBC affiliate it has always been far behind the other two VHF network affilitates in market share. Further, Vetter says that even with its recent three million dollar facilities upgrade the station reaches only two-thirds of the population of those stations. Further, the station points to a precarious financial history, citing "enormous operating losses" until 1983, when it realized a profit. Vetter explains that the station saw a dramatic 167% rise in net operating income in 1984, but thereafter profits have declined an average of 58% each year. The station suffered a loss of over 400,000 in 1987. Vetter projects that the station will endure a net income loss in 1988 of 748,757, in 1989 of 546,385, and in 1990 of 91,454 for a total of over 1,790,330 during this period. The applicant explains that in making these projections it assumed a growth in revenue from 1987 to 1990 of approximately 9% with expenses based on actual contractual obligations or on actual experience in the various line items. Vetter explained that the advertising revenues secured by the station have always been tied to the Baton Rouge economy which is oil industry based and now in decline.

Vetter maintains, however, that if the requested assignment of WQXY(AM)-FM is approved, the projections for combined station income show a turnaround in profitability. Although the applicant states that the projections for 1988 and 1989 indicate that the combination would initially result in losses of over two million dollars for those years, in 1990 the stations would realize a net income of 170,079. Further, the cash deficit of the stations would improve during those years.

Further, Vetter claims that the stations will benefit by the economies of joint ownership and operation and that they will be strengthened by its broadcast experience and ties to the community.[2] Vetter notes that it has reinvested the majority of its profits into improvements at WVLA-TV and that with the acquisition of the radio stations it will further improve news and public service programming.[3] Finally, according to the applicant, the Baton Rouge ADI, the 91st television market in the country, is served by 14 television and numerous AM and FM stations either licensed to Baton Rouge or providing coverage to all or a portion of the market. Further, Vetter states that there is approximately 60% cable penetration in the market.

Based on the above representations, we conclude, considering the totality of circumstances of this case, that the aural/UHF television combination would be in the public interest. *See Metromedia, Inc.*, 54 RR 2d 1469 (1983). We note that actual losses have only been documented for one year and that relatively recently three million dollars was invested for a facilities upgrade for the station. However, in *Arnold L. Chase*, 61 RR2d 111, 133 (1986), we stated that, where appropriate, the UHF exception can be applied to hasten a UHF stations' more sound financial operation and, hence, ensure its ability to offer effective, competitive UHF service to the public.

In any event, the Commission has allowed the establishment of aural/UHF television combinations where the profits generated by the radio stations were essential to the viability of the television stations. *See , e.g., Best Broadcasting Co., Inc.*, 54 RR 2d 1471 (1983). Vetter has demonstrated that based on its projected losses over next several years, how the influx of revenues generated by the radio stations is essential to the continued viability of UHF Station WVLA. Further, the applicant has pledged to reinvest profits generated by the combination into better news and public service programming. These programming commitments will add to the diversity of informational programming available in the market. Moreover, in view of the many other media services available, no concentration of the media will result from permitting WVLA to be owned and operated in combination with WQXY(AM) and WQXY-FM. Therefore, having found the applicant fully qualified, the application for Commission consent to the assignment of license of Stations WQXY(AM) and WQXY-FM, Baton Rouge, Louisiana from Encore Communications Associates, L.P. to Vetter Communications Company, Inc., IS GRANTED.

BY DIRECTION OF THE COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Applicants initial showing for a Note 4 exception was submitted on December 30, 1987. It was supplemented on March 23, 1988 with additional financial information.

[2] Vetter maintains that it is the only serious buyer for these stations and that Encore is realizing no profit from the sale and will apparently lose money.

[3] Vetter is committed toward upgrading WQXY-FM to full Class C status and claims that this will improve coverage and has potential for boosting the revenues that will then be available to help WVLA-TV. Revenue projections used in the Note 4 analysis, however, do not assume Class C status for WQXY-FM.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 20, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON US WEST'S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR VOICE MESSAGE SERVICE

On May 13, 1988, US West, Inc. (US West) filed a Comparably Efficient Interconnection (CEI) plan to provide voice messaging services on an unseparated basis. According to US West, its voice messaging services will allow customers to leave, direct and retrieve voice messages. US West also proposes, depending on the equipment available, to offer various enhanced features such as storage, retrieval, redirect, group broadcast, future delivery, reply, skip back or ahead, message scan, and pause features.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve the CEI plan before US West can begin implementing the proposed services. US West states that its CEI plan is identical, in all essential respects, to Pacific Bell's CEI plan, which the Commission has approved (Memorandum Opinion and Order, 3 FCC Rcd 1095 (1988)).

US West states that it will account for the joint and common costs of the voice message services pursuant to its Part 32 cost allocation manual that the Commission has approved (US West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195 (1988)). US West also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

Interested parties should file comments on this plan by *June 20, 1988*, and reply comments by *June* 30, 1988, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy of each pleading should be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. Copies of the US West's CEI plan can be obtained from ITS, (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI
TELECOMMUNICATIONS
CORPORATION

Petition for Revocation of MCI's FCC
Authority Revisited

ORDER

Adopted: May 19, 1988; Released: June 2, 1988

By the Commission:

1. On March 31, 1988, TeleSTAR, Inc. and its principals (TeleSTAR) filed a "Petition for Revocation of MCI's FCC Authority Revisited -- New FCC Violations by MCI During 1988 -- (PART I)" (Petition).[1] MCI Telecommunications Corporation (MCI) filed an Opposition on April 6, 1988. TeleSTAR did not file a reply.[2]

2. Much of TeleSTAR's Petition (at 1-7, 18-19) is an attack on the Commission's decision, in response to a previous TeleSTAR petition, to issue a notice of apparent liability for forfeiture to MCI rather than initiate a revocation proceeding. *MCI Telecommunications Corp.*, 3 FCC Rcd 509 (1988), *supplemented*, FCC 88-49, released February 18, 1988, *appeal pending sub nom. TeleSTAR, Inc. v. FCC*, No. 88-1153 (D.C. Cir.). [3] This portion of TeleSTAR's Petition is in the nature of an untimely petition for reconsideration and will not be considered. 47 C.F.R. § 1.106(f). Similarly, we will not consider the portion of TeleSTAR's Petition (at 18-19 n.58) constituting a collateral attack on the Commission's decision regarding TeleSTAR's own applications. *TeleSTAR, Inc.*, 2 FCC Rcd 7352 (1987), *on reconsideration*, FCC 88-171, released May 19, 1988.

3. The primary new allegation in TeleSTAR's latest petition is that MCI engaged in unlawful premature construction with respect to its Ventura/Santa Barbara, California microwave system in the period January through March, 1988. TeleSTAR submits affidavits and other exhibits supporting this allegation. As shown in the FCC telegrams attached to MCI's Opposition, however, MCI was granted Special Temporary Authority (STA) from the Commission, effective December 14, 1987, with respect to all four sites on this route. Opposition, Attachment. The STA was subsequently extended from March 15, 1988 to June 15, 1988. *Id.* Accordingly, in light of the fact that TeleSTAR has not alleged any unlawful premature construction prior to grant of the STA, its claim of premature construction is unfounded.[4]

4. Finally, we note TeleSTAR's suggestion that MCI had stated on its Form 435 applications that it was the "sole owner and operator" of the sites on the Ventura/Santa Barbara route, while building permits were obtained for the sites in other names. Petition at 9. This is neither "surprising" nor "suspicious," *id.*, as MCI never claimed on its Form 435 applications that it owned the sites involved. The relevant question (25(a)) to which it answered in the affirmative in its applications was whether it owned the proposed facilities "exclusive of site. . . ." *See, e.g., id.*, Att. I.A.7. Accordingly, there is no evidence of misrepresentation or other impropriety in this regard.

5. Accordingly, IT IS ORDERED that the "Petition for Revocation of MCI's FCC Authority Revisited -- New FCC Violations by MCI During 1988 -- (Part I)" filed by TeleSTAR, Inc. and its principals IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Because petitions to revoke filed by third parties are not cognizable under the Communications Act or our rules, consistent with our prior practice, we will treat TeleSTAR's Petition as an informal request for Commission action under Section 1.41 of our rules. *See* 47 C.F.R. § 1.41; *KSDK, Inc.*, 93 FCC 2d 893 (1983).

[2] On April 13, 1988, it did file an Errata. In addition, on May 19, 1988, while this order was before the Commission for decision, we received a TeleSTAR pleading entitled "Request to the FCC for Information on Missing Records" (Request). While this pleading could be dismissed as an untimely reply, *see* 47 C.F.R. § 1.45 (b), in an effort to ensure fairness to TeleSTAR, we have reviewed it. The concerns raised therein with respect to FCC records relating to the route at issue in this proceeding are addressed in note 4, *infra*. Indeed, the so-called "missing" documents relating to this route (Request at 4) were provided to TeleSTAR, at its request, on April 19, 1988. *See* note 4, *infra*. TeleSTAR's concerns regarding FCC records relating to an additional route, first raised in its Request, are outside the scope of this proceeding and will not be considered here.

[3] MCI has paid the 10,000 forfeiture.

[4] TeleSTAR claims that it obtained certified file copies from the Commission's Secretary of "every pertinent FCC record relative to the sites" involved, and that if any other relevant FCC document "appears," it "would be suspicious indeed." Petition, Att. I.A.1. at 1. In this regard, TeleSTAR says it obtained station files, a staff STA log from July 1, 1987 to "the present," and public notices regarding microwave applications and actions. *Id.* at 2. TeleSTAR itself made no requests to the Commission for certified files. Rather, the certified documents attached to TeleSTAR's Petition were provided in response to requests from a private copy service (Downtown Copy Center). No requests were made by Downtown Copy Center for microwave station files or for copies of recent STAs, which are kept in publicly- available notebooks by Domestic Radio Branch staff until they are placed in station files, and the attachments to TeleSTAR's Petition do not reflect that the Secretary certified that he was providing any such documents. Had copies of recent STAs been requested, they would have been provided. Indeed, on April 18, 1988, TeleSTAR informally requested copies of the MCI STA and the STA extension for the Ventura/Santa Barbara route, and certified copies from the Commission's public files were sent on April 19, 1988. With respect to the staff STA log, it is our understanding that for reasons unrelated to TeleSTAR's request for information, the staff decided in early December, 1987, to discontinue use of the log,

although some subsequent entries for December were nevertheless made, apparently by a staff person who was unaware that a decision had been made to discontinue use of the log.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEPORT INTERNATIONAL LTD. AND AMERICAN SATELLITE COMPANY

File No. I-T-C-86-115

For a certificate pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's rules to establish and operate two-way non-switched satellite business communications services between points in the United States and Montego Bay, Jamaica.

ORDER

Adopted: May 20, 1988; Released: June 2, 1988

By the Chief, International Facilities Division:

1. On April 13, 1988, the Chief, Common Carrier Bureau received letters from Teleport International Ltd. (TI) and American Satellite Company, d/b/a Contel ASC (Contel ASC) requesting that the Commission dismiss the above captioned application without prejudice. The application was orignally granted in October, 1986. The authorization was remanded for Commission review by court order January 12, 1988.[1] The applicants do not wish to pursue the matter further.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-86-115 IS DISMISSED WITHOUT PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] Teleport International Ltd., FCC 86-440 (released October 9, 1986), *remanded*, Communications Satellite Corporation v. FCC, 836 F.2d 623 (D.C. Cir. 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

BILL WELCH File No. 00547-CL-TC-1-88

For Commission Consent to Transfer of Control of the Florence, Alabama Non-Wireline Cellular Permit to McCaw Communications of Florence, Inc.

ORDER

Adopted: May 18, 1988; Released: May 20, 1988

By the Commission:

1. On April 19, 1988, the Mobile Services Division of the Common Carrier Bureau released a Memorandum Opinion and Order (MO&O) that granted the transfer of control of the above-referenced non-wireline cellular radio authorization. Pursuant to Section 1.117 of our rules,[1] we have decided to review that Division order.

2. In this proceeding, the Division found, among other things, that the for-profit transfer of control of the construction authorization conformed with Sections 301 and 304 of the Communications Act of 1934, as amended (Act). The order relied on the Common Carrier Bureau's decision in *Madison Cellular Telephone Company* [2], which applied Section 22.40(b) of the rules to permit the for-profit sale of an authorization for unbuilt facilities where the transferor showed that it had not acquired the cellular license with an intent to speculate.

3. We seek comment on whether the Division's decision to permit for-profit sales of cellular authorizations for unbuilt facilities was consistent with Sections 301 and 304 of the Act. Although the Commission does not ordinarily seek public comment in an adjudicatory proceeding, because of the general importance of the issues in this case, the Commission will entertain comments from all interested members of the public as well as the parties to this proceeding.

4. Members of the public are advised that this adjudicatory proceeding will continue to be conducted as a restricted proceeding in which all *ex parte* contacts are prohibited. *See* 47 C.F.R. Section 1.1208.

5. Accordingly, IT IS ORDERED that the record in this proceeding shall be brought before the Commission for review. Interested persons are invited to file comments in response to this Order by June 20, 1988 and reply comments by July 5, 1988. An original and 5 copies shall be filed with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

6. IT IS FURTHER ORDERED that the Secretary shall serve a copy of this Order on each party to this proceeding by certified mail.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] 47 C.F.R. Section 1.117. That rule states that "within 40 days after public notice is given of any action taken pursuant to delegated authority, the Commission may on its own motion order the record of the proceeding before it for review."

[2] 2 FCC Rcd. 5397 (Mob. Ser. Div. 1987). *See also Corpus* Christi Cellular Telephone Company, DA 88-428 (Comm. Car. Bur., released April 4, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-221

In the Matter of

Amendment of Section 73.202(b), RM-6177
Table of Allotments,
FM Broadcast Stations.
(Fort Valley and
Wrightsville, Georgia)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: April 25, 1988; Released: June 2, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers a petition for rule making filed by Fox Valley Broadcasting Corporation (petitioner), licensee of Station WQBZ(FM), Fort Valley, Georgia, which seeks to substitute Channel 292C2 for Channel 292A, and to modify its license to specify the Class C2 channel. In order to permit the use of Channel 292C2 at Fort Valley, petitioner has requested that Channel 260A be substituted for Channel 292A at Wrightsville, Georgia, and the construction permit for Station WIML(FM) be modified to specify the new Class A channel.

2. A staff engineering analysis indicates that both the Fort Valley and Wrightsville substitutions can be made in compliance with the minimum distance separation requirements. Petitioner has proposed to relocate its transmitter to a site 8 kilometers (5 miles) east of Fort Valley for operation on Channel 292C2, at coordinates 32-33-12 and 83-47-59. Coordinates used for Channel 260A at Wrightsville are the coordinates for WIML(FM)'s present site, 32-42-24 and 82-43-08.

3. In view of the above, we shall propose to modify the license for Station WQBZ(FM) (Channel 292A) to specify operation on Channel 292C2, as requested. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept other expressions of interest for use of Channel 292C2 at Fort Valley.

4. We are also issuing an *Order to Show Cause* to Wrightsville Broadcasting Co., permittee of Station WIML(FM), Wrightsville, Georgia, seeking comments as to why its permit should not be modified to specify operation on Channel 260A instead of Channel 292A. Commission policy requires that Station WIML(FM) be reimbursed for the reasonable costs of changing its frequency. Petitioner has stated its willingness to do so.

5. Comments are invited on the proposal to amend the FM Table of Allotments (Section 73.202(b) of the Rules) with respect to the following communities:

	Channel No.	
City	Present	Proposed
Fort Valley, Georgia	250A, 292A	250A, 292C2
Wrightsville, Georgia	292A	260A

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Wrightsville Broadcasting Co., permittee of Station WIML(FM), Wrightsville, Georgia, SHALL SHOW CAUSE why its permit Should Not Be Modified to specify operation on Channel 260A as proposed herein, instead of Channel 292A.

7. Pursuant to Section 1.87 of the Commission's Rules, Wrightsville Broadcasting Co., may, not later **July 25, 1988** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Wrightsville Broadcasting Co., to furnish additional information. If Wrightsville Broadcasting Co., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Wrightsville Broadcasting Co. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station WIML(FM) as follows: Wrightsville Broadcasting Co., c/o Charles Walters, Route 2, Box A, Barnesville, Georgia 30204.

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **July 25, 1988,** and reply comments on or before **August 9, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John H. Midlen, Jr.
1050 Wisconsin Avenue, N.W.
Washington, D.C. 20007
(Counsel for petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the*

Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Montrose H. Tyree, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the pulic are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-219

In the Matter of

Amendment of Section 73.202(b), RM-6213
Table of Allotments,
FM Broadcast Stations.
(Uniontown, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 19, 1988; Released: June 2, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the petition for rule making filed on behalf of William A. Gunter and Robert J. Long (petitioners), seeking the allotment of Channel 298A to Uniontown, Alabama, as that community's first local FM service. Petitioners state they will apply for the channel, if it is ultimately allotted.

2. A staff engineering analysis has determined that Channel 298A can be allotted to Uniontown in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter therefor is located in an area at least 4.9 kilometers (3.1 miles) southwest of the community to avoid short-spacing to Station WENN-FM (Channel 299C), Birmingham, Alabama.[1] Additionally, although the proposal herein infringes on the construction permit issued to Station WSJC-FM (Channel 298C), Magee, Mississippi (BPH-850711ID), the spacing requirements are met based upon its application to relocate the transmitter and decrease facilities to Class C1 standards (BPH-870623ID). Therefore, Channel 298A can be allotted to Uniontown contingent upon a license being granted to Station WSJC-FM at Magee, Mississippi as a Class C1 facility.

3. In light of the above, we shall seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Uniontown, Alabama, as follows:

	Channel No.	
City	Present	Proposed
Uniontown, Alabama	–	298A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 25, 1988,** and reply comments on or before **August 9, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, as follows:

William A. Gunter
Robert J. Long
c/o William A. Gunter
272 Commerce Street
Montgomery, AL 36104

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The restricted site coordinates are 32-24-46 and 87-32-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-270

In the Matter of

Amendment of Section 73.202(b), RM-6348
Table of Allotments,
FM Broadcast Stations.
(Waupun, Mayville and New Holstein,
Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 13, 1988; Released: June 1, 1988

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Coursolle Broadcasting of Wisconsin, Inc. (petitioner),[1] licensee of Station WGGQ(FM), Channel 257A, Waupun, Wisconsin, the Commission has before it for consideration a petition for rule making seeking the substitution of Channel 258C2 for Channel 257A at Waupun and modification of its license accordingly. In order to accomplish the channel substitution at Waupun, petitioner suggests substitution of Channel 226A for Channel 258A at New Holstein, Wisconsin which is currently occupied by Station KFKQ(FM); and substitution of Channel 254A, for vacant and applied for Channel 259A at Mayville, Wisconsin.[2]

2. Petitioner submitted information in support of its proposal for a first wide coverage area FM service at Waupun. Documents in support of the proposal were also submitted by F.W.K. Broadcasting Co. (F.W.K.), permittee of Station KFKQ(FM), New Holstein and Molly E. Huth (Huth), the sole applicant for Channel 259A at Mayville. KFKQ(FM) and Huth consented to the necessary channel changes and state a willingness to relocate their current transmitter sites. F.W.K. urges the Commission to allot Channel 226A to New Holstein thereby enabling it to proceed expeditiously with construction of its station. [3]

3. Our engineering analysis confirms that Channel 258C2 can be substituted for Channel 257A at Waupun in compliance with the Commission's minimum spacing requirements with a site restriction and provided the changes are made at New Holstein and Mayville, Wisconsin. The channel substitutions at New Holstein and Mayville can be made in compliance with Section 73.207 of the Commission's Rules, with site restrictions. Petitioner suggests a site restriction of 27.8 kilometers (17.2 miles) northwest of Waupun for Channel 258C2 in order to avoid a short spacing to Station WUSN(FM), Channel 258B, Chicago, Illinois.[4] Petitioner also suggests that Channel 226A at New Holstein utilize a site 11.4 kilometers (7.1 miles) northwest of the city.[5] The site restriction is necessary in order to avoid short spacings to Station WBKV-FM, Channel 223B, West Bend, Wisconsin and Station WQFM(FM), Channel 227B, Milwaukee, Wisconsin.[6] In addition, a site restriction of 10.4 kilometers (6.5 miles) east of Mayville was suggested for Channel 254A in order to avoid a short spacing to Station WVCX(FM), Channel 255C, Tomah, Wisconsin.

4. Since the Mayville channel is an 84-231 allotment, petitioner was required to demonstrate that the channel substitution at Mayville meets the spacing requirements for the site specified in the application on file as of the date its petition was submitted, in accordance with the *Memorandum Opinion and Order*, 51 FR 36401, October 10, 1986. Here, petitioner has obtained authorization from the sole applicant for Channel 259A at Mayville agreeing to make the necessary changes to accommodate the upgrade at Waupun. Huth states that she has obtained a workable site and is ready, willing and able to make such changes. Therefore, we shall go forth with the proposal based on the willingness of all concerned parties to relocate their existing or proposed sites.

5. In view of the aforementioned, we shall not issue a show cause order herein to KFKQ(FM). The Commission's established policy requires that petitioner reimburse Station KRKQ(FM) for reasonable costs of changing frequencies.

6. Due to the substantial site restrictions at Waupun, New Holstein and Mayville, petitioner is requested to demonstrate in its comments that a a city-grade signal can be provided from the suggested restricted sites.

7. As requested, we shall propose to modify the license of Station WGGQ(FM), to specify operation on Channel 258C2 in lieu of Channel 257A. Therefore, in accordance with Section 1.420(g) of the Rules, we shall not accept competing expressions of interest nor require that petitioner demonstrate the availability of an additional equivalent channel at Waupun.

8. In view of the fact that Waupun could receive its first wide coverage area FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Mayville, Wisconsin	259A	254A
New Holstein, Wisconsin	258A	226A
Waupun, Wisconsin	257A	258C2

9. IT IS ORDERED, That the Secretary of the Commission SHALL SEND, by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice* to the following: Frederick W. Kinlow, F. W. K. Broadcasting Co., W-238, S-6825 Highway F, Waukesha, WI 53186 and Ms. Molly E. Huth, P. O. Box 268, Mayville, WI 53050.

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **July 25, 1988,** and reply comments on or before **August 9, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Eugene T. Smith, Esquire
Attorney at Law
715 G Street, S. E.
Washington, D.C. 20003
(Counsel for petitioner)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner currently has a case pending before the D. C. Circuit Court of Appeals, *James R. Coursolle v. FCC and U.S.A.*, FCC 86-1618, seeking the upgrade of its facilities.

[2] Channel 259A was allotted to Mayville in MM Docket No. 84-231. See *First Report and Order* (50 FR 3514, January 25, 1985).

[3] Previously Channels 225A, 234A and 246A were suggested as a substitution for Channel 258A at New Holstein in separate petitions.

[4] The coordinates of the proposed site specified by the petitioner are 43-51-15 and 88-53-30.

[5] The proposed site coordinates are 44-02-30 and 88-09-30.

[6] The Commission has determined that a site restriction of 8.6 kilometers (5.3 miles) north of New Holstein will provide protection to the facilities at West Bend and Milwaukee, Wisconsin. The coordinates are 44-01-34 and 88-03-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-520

In the Matter of

Amendment of Section 73.202(b),	RM-5969
Table of Allotments,	
FM Broadcast Stations.	
(Rochester, Minnesota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 29, 1988; Released: June 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd. 7144 (1987), issued in response to a petition filed by Olmstead County Broadcasting Co. (petitioner), licensee of Station KWWK, Channel 244A, Rochester, Minnesota, proposing the substitution of FM Channel 243C2 for Channel 244A. Petitioner also requested modification of its license for Station KWWK accordingly. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 243C2 for Channel 244A at Rochester, Minnesota, since it could provide the community with its third wide coverage area FM service. As indicated in the *Notice*, Channel 243C2 can be allocated to Rochester in compliance with the minimum distance separation requirements of the Commission's Rules.[1]

3. We have authorized in paragraph 5, a modification of petitioner's license for Station KWWK, Rochester, Minnesota, to specify operation on Channel 243C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 18, 1988**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Rochester, Minnesota	243C2, 248C, 269A, 295C

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KWWK, Rochester, Minnesota, IS MODIFIED to specify operation on Channel 243C2 in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 243C2 are 44-02-32 and 92-20-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-502

In the Matter of

Amendment of Section 73.202(b), RM-6052
Table of Allotments,
FM Broadcast Stations.
(Star Lake, New York)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 29, 1988; Released: June 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Tia A. Soliday (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 6863 (1987), proposing the allocation of Channel 290B1 to Star Lake, New York, as the community's first local FM service. Petitioner filed comments reiterating her intention to apply for the channel, if allocated.[1] No other comments were received.

2. Channel 290B1 can be allocated to Star Lake in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.4 kilometers (11.4 miles) southeast to avoid a short-spacing to Station CHEZ-FM, Channel 291C1, Ottawa, Ontario, Canada.[2] Canadian concurrence has been received since Star Lake is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by allocating Channel 290B1 to Star Lake since it could provide the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 18, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Star Lake, New York	290B1

4. The window period for filing applications will open on **July 19, 1988,** and close on **August 18, 1988.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's comments were not timely filed. However, they have been accepted for the purpose of expressing continuing interest.

[2] The coordinates for this allotment are North Latitude 44-00-38 and West Longitude 74-56-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-232

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Georgetown, Marlin and San Saba, Texas) — RM-6310

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: April 29, 1988; Released: June 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Capitol Broadcasting Corporation (petitioner), licensee of Station KQFX(FM), Channel 243C2, Georgetown, Texas, requesting the substitution of Channel 244C1 for Channel 243C2 at Georgetown, and modification of its license to specify operation on the higher class frequency. Petitioner also suggested substituting Channel 225A for Channel 246A currently used by Station KRXX(FM) at Marlin, Texas and Channel 246A for Channel 244A, a vacant allotment at San Saba, Texas,[1] in order to accomplish the Georgetown substitution. Petitioner submitted information in support of its proposal to provide expanded FM coverage to Georgetown.

2. Petitioner claims that its station is "currently subject to substantial and pernicious interference" from Station KKHT(FM), Houston, Texas, due to "heat inversion." Petitioner further states that the public is being deprived of FM service from Station KQFX(FM), as a result of the interference. It states that it will promptly effectuate the proposed channel change, if granted.

3. An engineering analysis confirms that Channel 244C1 can be substituted for Channel 243C2 at Georgetown in compliance with the Commission's minimum spacing requirements with a site restriction of 1.8 kilometers (1.1 miles) northwest of the city.[2] The restriction is necessary to avoid a short spacing to Station KXGC-FM, El Campo, Texas. In addition, in order to effectuate the Georgetown substitution, channel substitutions are required at Marlin and San Saba, Texas. Since Marlin is a licensed station, we are herein issuing a *Show Cause Order* to Midwestern Broadcasting, Inc., licensee of Station KRXX(FM), seeking comments as to why its license should not be modified to specify operation on Channel 225A in lieu of Channel 246A.

4. Petitioner has indicated its willingness to reimburse Station KRXX(FM) for reasonable costs of changing frequencies, as required by Commission policy.

5. As requested, we shall propose to modify the license of Station KQFX(FM) to specify operation on Channel 244C1 in lieu of Channel 243C2. Therefore, in accordance with Section 1.420(g) of the Rules, we shall not accept competing expressions of interest nor require that petitioner demonstrate the availability of an additional equivalent channel at Georgetown.

6. Since San Saba is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence must be obtained from the Mexican government.

7. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Georgetown, Texas	243C2, 299A	244C1, 299A
San Saba, Texas	244A	246A
Marlin, Texas	244A	225A

8. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Midwestern Broadcasting, Inc., licensee of Station KRXX(FM), Channel 244A, Marlin, Texas, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 225A in lieu of Channel 244A.

9. Pursuant to Section 1.87 of the Commission's Rules, Midwestern Broadcasting, Inc., may, not later that **July 25, 1988,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Midwestern Broadcasting, Inc., to furnish additional information. If Midwestern Broadcasting, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Midwestern Broadcasting, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following: Midwestern Broadcasting, Inc., Country Club Road, Marlin, TX 76661; and Armadillo Broadcasting, Inc., P. O. Box 576, San Saba, TX 76877.

11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

12. Interested parties may file comments on or before **July 25, 1988,** and reply comments on or before **August 9, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Steve A. Lerman, Esquire
Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D. C. 20006-1809
(Counsel for petitioner)

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] There is an application pending for Channel 244A at San Saba, Texas. We shall herein serve the applicant, Armadillo Broadcasting, Inc., a copy of this Notice.

[2] The restricted site coordinates are 30-38-47 and 97-41-14. The coordinates petitioner proposes to relocate its transmitter site to are 30-30-00 and 97-54-00

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-231

In the Matter of

Amendment of Section 73.202(b), RM-6131
Table of Allotments,
FM Broadcast Stations.
(Mecca, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 29, 1988; Released: June 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. Craig L. Fox (petitioner) has filed a petition for rule making seeking the allotment of Channel 249A to Mecca, California, as that community's first local broadcast service. Petitioner states that he will apply for the channel if it is ultimately allotted.

2. A staff engineering analysis has determined that Channel 249A can be allotted to Mecca, California, consistent with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules.[1] However, since Mecca is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of the Mexican Government in the proposal.

3. In consideration of the foregoing, and since the instant proposal could provide a first local broadcast service to Mecca, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Mecca, California	–	249A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 25, 1988,** and reply comments on or before **August 9, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Craig L. Fox
1213 Madison St.
Syracuse, NY 13210

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] This determination is made based on the use of city reference coordinates of 33-34-18 and 116-05-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-254

In the Matter of

Amendment of Section 73.202(b), RM-6219
Table of Allotments,
FM Broadcast Stations.
(La Monte, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 2, 1988; Released: June 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for Rule Making filed by Johnson County Broadcasters, Inc. (petitioner), seeking the allocation of FM Channel 246A to La Monte, Missouri, as that community's first FM broadcast service. Petitioner stated its intention to file an application for Channel 246A at La Monte.

2. We believe petitioner's proposal warrants consideration. Channel 246A can be allocated to La Monte, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 7.4 kilometers (4.6 miles) east of the community.[1] The site restriction will prevent a conflict with a construction permit for Station KXTR, Channel 243C2, Kansas City, Missouri (BPH 860306IF).

3. In view of the fact that the proposed allocation could provide a first FM broadcast service to La Monte, Missouri, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
La Monte, Missouri	—	246A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 25, 1988,** and reply comments on or before **August 9, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jim McCollum, Vice President
Johnson County Broadcasters, Inc.
Box 547
Clayton, New Mexico 88415

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates used for Channel 246A at La Monte are 38-45-36 and 93-20-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-255

In the Matter of

Amendment of Section 73.202(b), RM-6211
Table of Allotments,
FM Broadcast Stations.
(Lexington, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 4, 1988; Released: June 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by D. J. Fox (petitioner), requesting the allotment of FM Channel 245A to Lexington, Michigan, as that community's first FM broadcast service. Petitioner stated his intention to file an application for Channel 245A at Lexington and build a station.

2. Petitioner requests that Channel 245A be allocated to Lexington, Michigan, with a site restriction 3.9 kilometers (2.4 miles) north of the community.[1] The site restriction will prevent a conflict with Station WJOI, Channel 246B, Detroit, Michigan.

3. Our review of petitoner's proposal confirms that Channel 245A can be allocated to Lexington in compliance with the Commission's minimum distance separation requirements provided the above mentioned site restriction is imposed on the channel. Our study further shows that the allotment would be short spaced by 9 kilometers to Station CKGL(FM) at Kitchener, Ontario, Canada. However, all of the interference would fall over Lake Huron. Thus, since the U.S.-Canadian Working Agreement specifically exempts the Great Lakes from interference protection, we shall propose the allocation. We have obtained concurrence from the Canadian Government for allotment of Channel 245A as a specially negotiated short spaced allotment.

4. We believe the public interest would be served by proposing the allocation of Channel 245A to Lexington since it could provide the community with its first FM broadcast service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below:

	Channel No.	
City	Present	Proposed
Lexington, Michigan	—	245A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 25, 1988,** and reply comments on or before **August 9, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

D. J. Fox
P.O. Box 10223
Lansing, Michigan 48901-0223

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates used for the allotment of Channel 245A at Lexington are 43-18-00 and 82-32-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-256

In the Matter of

Amendment of Section 73.202(b), RM-6298
Table of Allotments,
FM Broadcast Stations.
(Jasper, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 5, 1988; Released: June 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by KTXJ Radio, Inc. (petitioner), licensee of Station KWYX(FM), Channel 272A, Jasper, Texas, seeking the substitution of Channel 274C2 for Channel 272A and modification of its license to specify operation on the higher class channel. Petitioner submitted information in support of its proposal to provide the community with its second expanded FM service.

2. The channel substitution can be made in compliance with the Commission's minimum spacing requirements with a site restriction of 23.7 kilometers (14.7 miles) north of Jasper.[1] The restricted site is necessary to provide protection to applications pending for Channel 273C2 at Beaumont, Texas. Petitioner would be required to relocate its current transmitter site.

3. We shall proposed to modify the license of Station KWYX(FM) to specify operation on the higher class adjacent Channel 274C2, as requested. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Jasper.

4. In view of the fact that Jasper, Texas, could receive its second wide coverage area FM service the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Jasper, Texas	264C2, 272A	264C2, 274C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 25, 1988,** and reply comments on or before **August 9, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James P. Riley, Esquire
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D. C. 20036
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for the restricted site are 31-07-54 and 93-56-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-257

In the Matter of

Amendment of Section 73.202(b), RM-6299
Table of Allotments,
FM Broadcast Stations.
(Kingsville, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 5, 1988; Released: June 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Riviera Broadcasting Co. (petitioner), licensee of Station KODK(FM), Channel 224A, Kingsville, Texas, the Commission considers herein a petition for rule making seeking the substitution of Channel 224C2 for Channel 224A and modification of its license to specify operation on the higher class co-channel. Petitioner provided information in support of its proposal for expanded service at Kingsville.

2. The substitution can be made consistent with the Commission's minimum separation requirements with a site restriction of 27.7 kilometers (17.2 miles) east of Kingsville.[1] The restriction is necessary to avoid short spacings to Station KOPY(FM), Channel 221A, Alice, Texas, and applications pending for the use of vacant Channel 224A at South Padre Island, Texas. Because both the site restriction and the city of Kingsville are large, petitioner should demonstrate in its comments that it can provide city grade coverage to Kingsville from its proposed site.

3. The proposal must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Kingsville, Texas. In addition, since Kingsville is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence must be obtained from the Mexican government.

4. As requested, we shall propose to modify the license of Station KODK(FM) to specify operation on the higher class co-channel, Channel 224C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Kingsville.

5. We believe the public interest would be served by substituting Channel 224C2 for Channel 224A at Kingsville. Accordingly, in order to provide Kingsville with its second wide coverage area FM service, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Kingsville, Texas	224A, 248C1	224C2, 248C1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **July 25, 1988,** and reply comments on or before **August 9, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John E. Fiorini III, Esquire
Heron, Burchette, Ruckert
& Rothwell
1025 Thomas Jefferson Street, N.W.
Suite 700
Washington, D. C. 20007
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates of the restricted site determined by the Commission are 27-32-45 and 97-35-18. However, petitioner has specified a site 28.2 kilometers (17.5 miles) east of Kingsville. Petitioner's proposed site coordinates are 27-33-00 and 97-35-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-258

In the Matter of

Amendment of Section 73.202(b), RM-6347
Table of Allotments,
FM Broadcast Stations.
(Covington, Pennsylvania)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 9, 1988; Released: June 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Robin B. Thomas (petitioner), requesting the allotment of Channel 234A to Covington, Pennsylvania, as the community's first FM allotment. Petitioner expresses an intention to apply for the channel, if allotted.

2. Channel 234A can be allotted to Covington in compliance with the Commission's minium distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence in the allotment is required since Covington is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 234A to Covington, Pennsylvania, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Covington, Pennsylvania	–	234A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 25, 1988,** and reply comments on or before **August 9, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robin B. Thomas
R.D. 1, Box 114A
Muncy, Pennsylvania 17756
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 41-44-41 and West Longitude 77-04-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-378

In the Matter of

Amendment of Section 73.202(b), RM-5927
Table of Allotments,
FM Broadcast Stations.
(Saint Robert, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 29, 1988; Released: June 3, 1988

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission is the *Notice of Proposed Rule Making*, 2 FCC Rcd. 5707 (1987), proposing the allocation of FM Channel 243A to Saint Robert, Missouri, as that community's first FM broadcast service. The *Notice* was issued in response to a petition filed by Kevin A. Barton (petitioner).

2. The Commission did not receive supporting comments from the petitioner or any other party, and consistent with the policies and procedures set forth in the Appendix to the *Notice*, we shall dismiss the petition to allocate an FM channel to Saint Robert, Missouri.

3. In view of the foregoing, IT IS ORDERED, That the petition of Kevin A. Barton, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-265

In re Applications of

VALMEDIA, INC. File No. BPH-860918MD
(Hereafter Valmedia)

BERNARD A. O'NEILL File No. BPH-860918OI
(Hereafter O'Neill)

CHRISTIAN FM APPLICATION PARTNERSHIP File No. BPH-860918OU
(Hereafter Christian Fort Valley)

HOLY SPIRIT FM PARTNERSHIP File No. BPH-860918OF
(Hereafter Spirit)

For a Construction Permit
for a New FM Station
on Channel 250A
in Fort Valley, Georgia.

HEARING DESIGNATION ORDER

Adopted: May 18, 1988; Released: June 3, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Settlement Agreement.* On November 21, 1986 Christian Fort Valley and Spirit filed a joint agreement to merge, thereby forming Christian FM Limited Partnership and dismissing the Spirit application. Our review of Christian Fort Valley's instant application indicates that all of its principals were parties to the application of Christian FM Application Partnership of Raleigh (hereafter "Christian Raleigh), for a new FM station in Raleigh, North Carolina (BPH-860707NB). Spirit also filed an application (BPH-860707NX) for Raleigh. On September 15, 1986, only three days before the filing of the applications herein, a joint motion for settlement was filed by Christian Raleigh and Spirit proposing the withdrawal of Christian Raleigh's application. We note further that in both the Raleigh proceeding and now in Fort Valley, Christian Fort Valley and Spirit have submitted identical engineering portions of their applications, prepared by the same technical consultant, specifying exactly identical broadcast facilities. Moreover, counsel for Christian Fort Valley withdrew on November 13, 1986 and was replaced by Spirit's counsel when the merger agreement was filed on November 21, 1986, approximately 90 days after the applications were submitted. On the face of the applications, it is apparent that Christian Raleigh/Christian Fort Valley and Spirit have submitted applications in two markets which contain identical technical proposals prepared by a common consultant. The preparation and filing of the Fort Valley applications on the heels of the Raleigh settlement, followed by the proposed settlement herein by which all of Spirit Fort Valley's general partners will become limited partners in Christian Fort Valley, evidences a pattern of conduct which precludes a determination on the facts at hand that the Christian Fort Valley and Spirit applications were not filed for the purpose of "reaching or carrying out" a settlement agreement, as the Commission is required to find by 47 U.S.C. Section 311(c)(3)(B). Therefore, an appropriate issue will be specified to determine whether the proposed settlement agreement would violate Section 311 of the Communications Act, as amended.

3. *Valmedia.* Valmedia has indicated that in the event of the grant of its construction permit it will divest itself of commonly-owned WXKO(AM), Fort Valley, Georgia within 3 years of program test authority. An appropriate condition will be specified.

4. Since the proposal of Valmedia[1] may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, Valmedia is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Valmedia will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Attempts to obtain Federal Aviation Administration (FAA) clearence through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by the applicants below would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

APPLICANTS: Christian Fort Valley, Spirit.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR

HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the proposed settlement agreement between Christian Fort Valley and Spirit is in violation of 47 U.S.C. Section 311.

2. If a final environmental impact statement is issued with respect to Valmedia, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

3. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: Christian Fort Valley, Spirit.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That in the event of the grant of the application of Valmedia, the construction permit shall contain a condition that Valmedia shall divest itself of all interest in, and all connection with, WXKO(AM) within 3 years of the grant of the construction permit and no license shall be granted for operation of Channel 250A until such divestment.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Valmedia shall submit the environmental assessment required by § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than June 24, 1988, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX

Additional Issue Paragraph

1. To determine whether the proposed settlement agreement between (C) Christian Fort Valley and (D) Spirit is in violation of 47 U.S.C. Section 311.

FOOTNOTE

[1] Valmedia's proposal indicates a possible RF radiation hazard. Valmedia's study shall include the effects to co-located AM station WXKO.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-276

In re Applications of

JEFFREY L. BOUDREAUX, (hereafter Boudreaux) File No. BPH-870529MA

WNLB RADIO, INC. (hereafter WNLB) File No. BPH-870529MB

WYTI, INC. (hereafter WYTI) File No. BPH-870529MP

For Construction Permit for
New FM Station, Channel 260A, 99.9 MHz
Rocky Mount, Virginia

HEARING DESIGNATION ORDER

Adopted: May 23, 1988 **Released: June 3, 1988**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Boudreaux*. As originally filed, Boudreaux's application was a partnership consisting of himself, Joseph P. Durham and Joseph E. Prater. This partnership certified that it was financially qualified to construct and to operate the proposed station for the first 90 days. On April 6, 1988, Boudreaux filed an amendment to disclose the dissolution of the partnership and the withdrawal of Durham and Prater, and that Boudreaux, as an individual, would be prosecuting the application. Furthermore, the applicant stated that he could no longer certify that he had sufficient funds to construct and to operate the station for the first 90 days. A further amendment, with respect to his financial qualifications, was promised as forthcoming. To date, the Commission has not received this amendment. Accordingly, a financial issue will be specified.

3. The applicant has indicated that he is an employee of WXLK(FM), Roanoke, Virginia and that, if awarded a construction permit as a result of this proceeding, this employment will be terminated. Accordingly, Boudreaux's divestiture commitment will be reflected in an appropriate ordering clause.

4. *WNLB*. The applicant has indicated that it will colocate its antenna on the existing tower of commonly owned WNLB(AM), Rocky Mount, Virginia. WNLB states in its application that the coordinates on file with the Commission for the WNLB(AM) tower are incorrect. According to Commission records, the accepted coordinates for this tower are north latitude 36-58-39" and west longitude 79-53-46". The WNLB application lists the corrected coordinates as north latitude 36-58-37" and west longitude 79-53-45". These corrected coordinates have been given to the Federal Aviation Administration. In its application, WNLB states that an amendment, including the corrected coordinates, would be filed to a pending application for a construction permit to modify the facilities of WNLB(AM) (BP-861029AC). The construction permit for this application was granted on September 9, 1987. At the time of grant, no corrective amendment had been filed. On March 9, 1988, the Chief, FM Branch, in a letter, notified WNLB that although the promised amendment had not been received, normal processing of its application would continue, but requested that the amendment be immediately submitted to the AM Branch. Finally, the letter warned that the coordinate discrepancy would have to be resolved before WNLB's FM application could be granted. Accordingly, in the event a construction permit is awarded to WNLB as a result of this proceeding, a grant of its construction permit shall be deferred pending receipt of an amendment filed on FCC Form 301 which corrects the coordinates of the tower of WNLB(AM).

5. WNLB is proposing to sidemount its antenna on the tower of commonly owned WNLB(AM). Engineering study of the WNLB application reveals that the combined operation of the existing AM station and proposed FM station may significantly exceed the radio frequency radiation guidelines set forth in 47 C.F.R. § 1.1307. Since the proposal of WNLB may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, the applicant is required to submit the information delineated in 47 C.F.R. § 1.1311. Accordingly, the WNLB will be required to file within 30 days of the release of this Order an Environmental Assessment with the presiding Administrative Law Judge.[1] In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

6. WNLB has indicated that as the licensee of WNLB(AM), Rocky Mount, Virginia, if it receives a construction permit as a result of this proceeding, it and its principals will divest themselves of all interest in the AM station within three years of the commencement of program test authority for the proposed FM station. Accordingly, WNLB's divestiture commitment will be reflected in an appropriate ordering clause.

7. *WYTI*. The applicant has indicated that it is the licensee of WYTI(AM), Rocky Mount, Virginia and that if it receives a construction permit as a result of this proceeding, it and its principals will divest themselves of all interest in the AM station. Accordingly, a divestiture commitment will be reflected in an appropriate ordering clause.

8. The applicant has indicated that the proposed station will be 100% owned by William E. Jefferson and that the officers and directors of its corporation are William E. Jefferson, president; Susan J. Mullins, vice president; and Frances G. Jefferson, secretary & treasurer. Item 4(8), Section II of FCC Form 301 asks for the applicant to provide "all other ownership interests of 5% or more, whether or not attributable, *as well as any corporate officership or directorship in broadcast, cable, or newspaper*

entities in the same market (emphasis added)." In response to this Item, WYTI has indicated that William E. Jefferson is 100% owner, president and a director of WYTI(AM), and that the other principals do not serve as officers or directors of this station. Commission ownership records reflect that Susan J. Mullins and Francis G. Jefferson also serve in the same capacity for WYTI(AM) as for the instant application. Accordingly, WYTI will be required to file a clarifying amendment within 30 days of the release of this Order with the presiding Administrative Law Judge.

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Boudreaux whether the applicant is financially qualified.

2. If a final environmental impact statement is issued with respect to WNLB, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.130-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to Boudreaux as a result of this proceeding, he shall terminate his employment at WXLK(FM), Roanoke, Virginia prior to the commencement of program test authority.

13. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to WNLB as a result of this proceeding, that grant of the construction permit shall be withheld pending receipt of an amendment filed on FCC Form 301 which corrects the coordinates for the WNLB(AM) tower.

14. IT IS FURTHER ORDERED, That WNLB shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to WNLB as a result of this proceeding, the applicant and its principals shall divest themselves of ownership and all interest in WNLB(AM), Rocky Mount, Virginia within 3 years of commencement of program test authority.

16. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to WYTI as a result of this proceeding, the applicant and its principals shall divest themselves of ownership and all interest in WYTI(AM), Rocky Mount, Virginia prior to the commencement of program test authority.

17. IT IS FURTHER ORDERED, That WYTI shall file within 30 days of the release of this Order, an amendment with the presiding Administrative Law Judge clarifying its response to Item 4(8), Section II of FCC Form 301.

18. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 24, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] This study must also include calculations of exposure levels measured at the base of the tower which account for the cumulative effect of the proposed facilities in conjunction with all other broadcast facilities and construction permits sharing the proposed tower.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-273

In re Applications of

WHITE MOUNTAIN RADIO (hereafter White Mountain) — File No. BPH-860828MB

CAMPTON BROADCASTING, A LIMITED PARTNERSHIP (hereafter Campton) — File No. BPH-860902MF

For a Construction Permit for a New FM Station on Channel 289A (105. 7 MHz) in Campton, *New Hampshire*

HEARING DESIGNATION ORDER

Adopted: May 19, 1988; Released: June 3, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
White Mountain	April 14, 1987

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if either.

5. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: White Mountain.

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **June 24, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-272

In Re Applications of

BARKER BROADCASTING CO., INC. (hereafter Barker) File No. BPH-870706MG

MANCHESTER COMMUNICATIONS, LTD. (hereafter Manchester) File No. BPH-870707MC

For Construction Permit for a
New FM Station, Channel 289A, 105.7 MHz
Manchester, Kentucky

HEARING DESIGNATION ORDER

Adopted: May 19, 1988; Released: June 3, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Barker*. The applicant indicates that it will colocate its antenna on the existing tower of KWF903, Manchester, Kentucky. Commission records indicate that the accepted coordinates for this tower are north latitude 37-08-57" and west longitude 83-45-09". However, Barker's application states that the coordinates for the tower are north latitude 37-08-59" and west longitude 83-45-08". This error has no effect on the acceptability of Barker's application, which complies with all of our technical acceptance requirements. Since Barker clearly proposes to located on an existing tower of a Commission licensee and because specific reference is made to this tower in various places in Barker's application, the staff has been able to draw on the application as a whole to confidently verify the transmitter location and by taking official notice of the site coordinates as found in Commission files for the licensed colocated facility. However, Barker shall be required to file an amendment specifying the correct coordinates of the tower on which it proposes to colocate its antenna within 30 days of the release of this Order with the presiding Administrative Law Judge.

3. Barker has indicated that it is the licensee of WKLB(AM), Manchester, Kentucky and that its two principals are also stockholders in the ownership of the AM station. Barker and its two principals have indicated that if a construction permit is awarded to them as a result of this proceeding, they will divest themselves of all interest in WKLB(AM). Accordingly, an appropriate divestiture condition will be added.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if either.

6. IT IS FURTHER ORDERED, That Barker shall file an amendment specifying the correct coordinates of the tower on which it proposes to locate its antenna within 30 days of the release of this Order with the presiding Administrative Law Judge.

7. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to Barker, the applicant and its principals will divest themselves of interest held in station WKLB(AM), Manchester, Kentucky prior to the commencement of program tests.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 24, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-275

In re Applications of

JULIA S. ZOZAYA (hereafter Zozaya)	File No. BPH-860703MI
A BCD BROADCASTING CO. (hereafter A BCD)	File No. BPH-860707MG
FLAGSTAFF BROADCASTING FOUNDATION (hereafter Foundation)	File No. BPH-860707NQ
FM FLAGSTAFF LIMITED PARTNERSHIP (hereafter FM Flagstaff)	File No. BPH-860707OB
FLAGSTAFF BROADCASTING PARTNERSHIP (hereafter Flagstaff Partnership)	File No. BPH-860707OC
PINETOP PARTNERS, INC. (hereafter Pinetop)	File No. BPH-860707OD
COMMUNICATIONS, LTD. (hereafter Communications)	File No. BPH-860707MP (DISMISSED HEREIN)

For a Construction Permit for a New FM Station on Channel 261C2 (102.9 MHz) in Flagstaff, Arizona.

HEARING DESIGNATION ORDER

Adopted: May 20, 1988; Released: June 3, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* On February 2, 1988, Communications requested dismissal of its above-captioned application to serve Flagstaff, Arizona. Communications had previously stated in an amendment to its application filed November 20, 1987 that it would seek dismissal if the Commission approved the assignment of the license of Station KENR(FM), Flagstaff, to the Voice of Northern Arizona, Limited Partnership, and if the assignment were consummated. The assignment was subsequently consummated on January 9, 1988. Accordingly, Communications' application will be dismissed.

3. The captioned applications specify Channel 275C2. At the time they were filed, that channel was available for application. Subsequently, the Commission amended the FM Table of Allotments, Section 73.202(b) of its Rules, effective January 29, 1988, by deleting Channel 275C2 and adding Channel 261C2 at Flagstaff. *See Report and Order, Sedona, Arizona*, 2 FCC Rcd 7421 (1987). Since Channel 275C2 is no longer available for use at Flagstaff, the ultimate permittee will be required to file an amendment specifying Channel 261C2 in lieu of Channel 275C2. If the channel substitution requires a change in transmitter site, the permittee may file an appropriate amendment specifying a site conforming to the Commission's minimum distance separation standards set forth in Section 73.207 of the rules.

4. *A BCD.* The applicant has indicated in response to FCC Form 301, Section II, Item 7(d), that a character issue has been raised against principal Louis B. Burke, Jr. under File No. BPH-830620AA for a new FM service in Bakersfield, California, MM Docket No. 84-969. The issue in the Bakersfield proceeding was framed as follows:

> To determine whether Burke misrepresented facts or lacked candor in representing that his proposed 3.16 mV/m signal would cover the community of Bakersfield, and, if so, to determine the effect of such misrepresentation and/or lack of candor on Burke's basic and/or comparative qualifications.

Since Burke was ultimately dismissed from that proceeding (*Order*, FCC 85M- 1526), the merits of the character issue were never addressed.

5. A BCD now asserts that Burke filed an explanatory amendment to an application for an FM translator station in Cottonwood, Arizona, File No. BPFT-860326TD, that the Cottonwood application has been granted, and that all outstanding character issues have been resolved in Burke's favor. A review of the events surrounding the processing of the above translator application has disclosed that the Auxiliary Branch processing staff erroneously failed to consider the explanatory amendment in question. Accordingly, an appropriate issue will be specified below since the issue in the Bakersfield proceeding has never been appropriately resolved.

6. A BCD proposes to side-mount its antenna on the existing KNAZ-TV tower. A BCD used 8400 feet (2560 meters) throughout its application as the elevation of the ground above mean sea level. However, KNAZ-TV's current authorization, Foundation's application (which proposes the same tower), and A BCD's topographic site map indicate 8460 feet (2579 meters) as the elevation. Because A BCD clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in A BCD's application, the staff could, drawing on the application as a whole, identify the site elevation for the proposed tower in the application by taking official notice of the tower data as found in the Commission's files for the licensed co-

located facility. Further, the 60 foot (18 meter) upward correction in site elevation presumably also requires a corresponding 60 foot (18 meter) increase in antenna height above average terrain. Such a correction would have no effect on the acceptability of the application because the proposal as filed or with the increased HAAT would not violate the maximum ERP-HAAT combination for Class C2 facilities pursuant to 47 C.F.R. § 73.211. However, A BCD will be required to submit an appropriate amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. A BCD and Foundation each propose to locate their FM antennas on the KNAZ-TV tower, which currently supports two other FM antennas. Pinetop proposes to construct a new FM tower within 0.1 kilometers of the KNAZ tower near other FM antennas operating from the same mountaintop location. Our study indicates that the combined operation of the existing stations and the new proposals may significantly exceed the ANSI C95.1-1982 exposure guidelines for human exposure to radiofrequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that these applicants may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN. Docket No. 79-163, 51 Fed. Reg. 14999 (Apr. 22, 1986). In addition, we find that FM Flagstaff's proposal, with its proposed radiation center only 15 feet above ground level, may by itself exceed these guidelines. Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since the proposals of A BCD, Foundation, FM Flagstaff, and Pinetop may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, they will be required to file an EA with the presiding Administrative Law Judge within 30 days of the release of this Order. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with rhe provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980)

8. *Other matters.* In response to Section VI, FCC Form 301, the applicants below have indicated that they will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO programs submitted by the following applicants are incomplete or are otherwise deficient in the manner described below. Accordingly, the applicants listed below will be required to file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANTS	DEFICIENCIES
A BCD, Foundation	Failed to identify specific sources of recruitment specializing in women and minority candidates; failed to identify publications it will utilize in attracting women and minority candidates; failed to identify educational institutions with substantial women and minority enrollments from which the applicant intends to recruit employees.

9. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
FM Flagstaff	February 13, 1987; August 14, 1987; October 29, 1987; February 10, 1988; April 18, 1988
Flagstaff Partnership	September 8, 1987
Pinetop	December 22, 1987

10. Data submitted by the applicants indicate there would be significant differences in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant Pinetop have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Pinetop would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceedings.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1(a). To determine, in light of the facts and circumstances surrounding the issue designated in the Bakersfield, California proceeding (MM Docket No. 84-969), whether Burke's proposed facility would

have provided the requisite 3.16 mV/m signal over the entire community of Bakersfield in accordance with 47 C.F.R. § 73.315(a).

(b). To determine, in light of the facts adduced pursuant to the foregoing issue (a) above, whether Burke misrepresented facts to, or concealed information from, the Commission.

(c). To determine, in light of the facts adduced pursuant to issues (a) and (b) above, whether Burke and hence A BCD possess the basic qualifications to be a licensee of the facilities sought here.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: Pinetop.

3. If a final environmental impact statement is issued with respect to any of the following applicants, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules: A BCD, Foundation, FM Flagstaff, Pinetop.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That the application filed by Communications IS HEREBY DISMISSED.

15. IT IS FURTHER ORDERED, That in accordance with paragraph hereinabove, A BCD shall submit the required amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicants shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division: A BCD, Foundation, FM Flagstaff, Pinetop.

17. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, following applicants shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge: A BCD, Foundation.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: FM Flagstaff, Flagstaff Partnership, Pinetop.

19. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

20. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **June 24, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-274

In re Applications of

Eric R. Hilding (hereafter Hilding)	File No. BPH-861230MF
William McGee and Frank R. Castillo d/b/a McGee/Castillo Communications (hereafter Castillo)	File No. BPH-861230MG
Chris W. Kidd d/b/a Kidd Communications (hereafter Communications)	File No. BPH-861231ML
California Broadcasting Company, Inc. (hereafter California)	File No. BPH-861231MM
Spanish Aural Services Company (hereafter Spanish)	File No. BPH-861231MN

For Construction Permit
for a New FM Station on
Channel 299A in Kings Beach, CA

HEARING DESIGNATION ORDER

Adopted: May 20, 1988; Released: June 3, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Hilding*. A Commission study based upon OST Bulletin No. 65, October, 1985 entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation" reveals ANSI limit of 1 mW/cm^2 may be significantly exceeded in the transmitter building. Pursuant to the Public Notice dated January 28, 1986, mimeo 2278, the applicant must show what steps will be taken to insure the protection of people and employees in the building. Since the proposal of Hilding may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, Hilding is required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Hilding will be required to file within 30 days of the release of this Order an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Service Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

3. The material submitted by the applicant below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency:

APPLICANT	DEFICIENCY
Hilding	Responded "no" to Items 1 and 2, Section III, Page 5, FCC Form 301 (Financial qualifications)

4. *EEO*. The Commission requires that if there will be five or more fulltime employees, the applicant must complete and file an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. Castillo has not listed any local sources for attracting minority job applicants. Accordingly, Castillo will be required to amend its application to provide the information.

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after February 27, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Hilding	5/28/87, 7/29/87
California	10/22/87

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Hilding, in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

2. To determine with respect to the following applicant whether, in light of the evidence adduced concerning the deficiency set forth above in paragraph 3, the applicant is financially qualified: Hilding

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. to determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Hilding shall submit the environmental assessment required by § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That Castillo shall amend its application as specified in paragraph 4 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Hilding, California

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M. St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **June 24, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

NOTE: Due to certain electronic conversion problems, this document could not be printed in the usual format associated with the FCC Record.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 88-172
37384

In the Matter of	)	
	)	
Policy and Rules Concerning Rates for Dominant Carriers	)	CC Docket No. 87-313

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: May 12, 1988 ; Released: May 23, 1988

By the Commission: Commissioner Dennis issuing a separate statement at a later date.

		Paragraphs
I.	Introduction	
	A. Procedural History	1 - 4
	B. Background and Summary of Further Notice	5 - 23
II.	Dominant Carrier Regulation	
	A. Current Approach: Rate-of-Return Regulation	24 - 56
	B. Experience with Alternative Approaches	57 - 81
	C. The Price Cap Proposal	82 - 148
	D. Price Caps for Local Exchange Carriers	149 - 188
III.	Legal Authority	189 - 207
IV.	Price Cap Implementation	
	A. Overview	208 - 209
	B. Initiating Price Cap Regulation	210 - 263
	C. Additional Safeguards for Consumers and the Competitive Process	264 - 291
	D. Tariff Filing and Review Procedures; Retention of Existing Rules	292 - 332

V. Adjustments to Capped Rates

A. Selecting Adjustment Factors 333 - 423
B. Methodology for Adjusting Price Caps 424 - 474

VI. Impact of Price Caps on Current Commission Rules and Procedures

A. Geographically Averaged Toll Rates 475 - 485
B. Quality of Service 486 - 495
C. Other Rules and Procedures 496 - 515

VII. Regulatory Flexibility Act Initial Analysis 516 - 517

VIII. Paperwork Reduction Act Analysis 518

IX. Ex Parte Requirements 519 - 521

X. Ordering Clauses 522 - 531

Appendix A -- List of Pleadings
Appendix B -- Summary of Proposed Price Cap Plan
Appendix C -- Analysis of AT&T Productivity (1984-88)
Appendix D -- Price Cap Caluculations: Some Examples
Appendix E -- Proposed Amendments to Code of Federal Regulations

I. INTRODUCTION

A. Procedural History

1. In a Notice of Proposed Rulemaking adopted August 4, 1987, we initiated this proceeding to examine our current approach to regulating dominant carriers' rates for interstate basic service offerings.[1] Our examination led us to conclude tentatively that this approach, which is built on the concept of directly limiting a carrier's rate of return, is flawed from a public interest standpoint, for several reasons. Foremost among them is that it does not encourage the kinds of economically efficient behavior by

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1 Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Notice of Proposed Rulemaking, 2 FCC Rcd 5208 (1987) (Notice). This Commission is obligated to review its policies and rules periodically to determine if they continue to further the objectives they originally were designed to achieve. See generally Geller v. FCC, 610 F.2d 973, 979-80 (D.C. Cir. 1979).

regulated firms that result in cost savings, product innovations, and, ultimately, lower rates for consumers. We also considered a different approach to regulating dominant carriers, which we referred to as the "price cap" model. Essentially, this approach limits dominant carriers' rate increases and, in so doing, replicates competitive market forces more accurately than rate-of-return regulation. Consumers will benefit from this approach because year after year the price cap system should result in each carrier's total rates being lower in real terms. Carriers also have an opportunity to benefit because their profit levels under a price cap system are directly tied to their management of underlying costs. Carriers that cut costs and improve efficiency will see their profits rise. Carriers that fail to cut costs or improve efficiency will see their profits fall.

2. In the Notice, we tentatively concluded that price cap regulation could benefit consumers, increase efficiency, promote innovation and competition, and further the public interest more effectively than existing regulation, and at lower cost to society. The Notice also presented a series of specific issues associated with price cap implementation and requested comment on each of our tentative conclusions. More than 80 interested parties filed in response, including consumer organizations, representatives of small and large telecommunications users, dominant and non-dominant carriers, and industry trade groups. In addition, the Notice drew comments from governmental entities with significant regulatory experience in the telecommunications arena, including individual state public utility commissions, the National Association of Regulatory Utility Commissioners, the United States Department of Justice, the Office of Telecommunications, United Kingdom, and the National Telecommunications and Information Agency.[2] Many commenters submitted specific price cap

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2 Appendix A to this Further Notice lists all parties participating in this proceeding, and indicates the abbreviated citation forms used in this Further Notice to refer to these parties. The Department of Justice accompanied its reply comments with a motion to accept the late-filed pleading. See United States Department of Justice, Motion for Leave To File Reply Comments Out of Time, CC Docket No. 87-313, filed Dec. 11, 1987. The motion was opposed by Bell Atlantic. See Bell Atlantic Telephone Companies, Opposition to the Department of Justice's Motion for Leave To File Reply Comments, CC Docket No. 87-313, filed Dec. 24, 1987. We shall grant the motion filed by the Department of Justice in order to ensure a complete record in this proceeding, and in light of the fact that any possible prejudice to the interests of any other party which might have ensued from our grant of the motion is nullified by the fact that we are instituting an additional round of comments in this proceeding before taking any final action. We also note that two different sets of reply comments were filed by the Puerto Rico Telephone Company. Commission staff has been informally advised by PRTC that reply comments filed on its behalf by the law firm of Dow, Lohnes, and Albertson were intended to serve as the official submission of PRTC. This set

proposals that differed from the one described in the Notice. In order to facilitate our review of these proposals, we asked parties who had suggested alternative plans to supplement their initial filings with specific proposed amendments to the Code of Federal Regulations that would be required to implement such plans.[3]

3. With few exceptions, the comments reflect a fairly broad consensus that the deficiencies of rate-of-return regulation described in the Notice are real and warrant correction. The majority of commenters agree in principle that a price cap regulatory approach could be tailored to correct these deficiencies in connection with regulation of the dominant interexchange carrier (IC), American Telephone and Telegraph Company (AT&T). Less consensus exists on the issue of whether price caps represent a reasonable approach to regulating local exchange carriers (LECs). And a wide array of proposals has been offered on particular issues relating to the initiation of price cap regulation and its ongoing administration.

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of reply comments has been included in our review of the record.

3 See FCC Public Notice, Parties in Price Cap Proceeding Requested To File Draft Rules Implementing Proposed Price Cap Plans, DA 88-6, released Jan. 6, 1988 (Public Notice). The Public Notice established a pleading cycle for the purpose of permitting interested parties to comment on the limited question of whether the proposed rules appropriately implement the proposed plans. Following the submission of these comments, the Southwestern Bell Telephone Company (Southwestern Bell) filed a motion to strike certain portions of these comments, arguing that they fell outside the limitations established in the Public Notice. See Southwestern Bell Telephone Company, Motion To Strike, CC Docket No. 87-313, filed Feb. 17, 1988 (motion to strike rule submission comments filed by Ad Hoc, Centel, Comptel, Hawaii, IDCMA, the Networks, NTCA, OPASTCO, and PRTC). A number of parties filed oppositions to Southwestern Bell's motion. See Ad Hoc Telecommunications Users Committee, Opposition to Motion To Strike, CC Docket No. 87-313, filed Mar. 1, 1988; Independent Data Communications Manufacturers Association, Opposition to Southwestern Bell Telephone Company's Motion To Strike, CC Docket No. 87-313, filed Feb. 26, 1988; National Telephone Cooperative Association, Opposition to Motion To Strike, CC Docket No. 87-313, filed Feb. 26, 1988; Puerto Rico Telephone Company, Opposition to Motion To Strike, CC Docket No. 87-313, filed Mar. 1, 1988; State of Hawaii, Opposition to Southwestern Bell Telephone Company's Motion To Strike, CC Docket No. 87-313, filed Feb. 26, 1988. Our decision to issue this Further Notice creates an opportunity for all interested parties to address the substantive issues embodied in the proposed rules filed in response to the Public Notice, rendering the issues raised in the motion and oppositions moot. Therefore, the Southwestern Bell motion is dismissed.

4. The comments have helped narrow the number and scope of issues that need to be addressed before price cap regulation can be implemented effectively. Based upon our review of these comments, we issue this Further Notice of Proposed Rulemaking, setting forth our specific proposal for price cap regulation and seeking comment on this proposal.

B. Background and Summary of Further Notice

5. The Communications Act of 1934 (Act)[4] grants this Commission a mandate to regulate "so as to make available ... efficient, Nation-wide ... communication service, with adequate facilities at reasonable charges ...."[5] The Act provides us with various tools to fulfill this mandate,[6] as well as

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4 47 U.S.C. § 151 et seq.

5 47 U.S.C. § 151.

6 Under Section 4(i), this Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions," while Section 4(j) permits this Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. §§ 154(i), 154(j). Section 201(b) of the Act also authorizes this Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]." 47 U.S.C. § 201(b). Title II of the Act also contains provisions granting this Commission the powers commonly associated with public utility regulation. These powers include the authority to require a carrier to interconnect with other carriers and to establish through routes, 47 U.S.C. § 201(a), to determine whether carriers' rates and conditions of service are just and reasonable, 47 U.S.C. § 201(b), and without unreasonable preferences or discriminations, 47 U.S.C. § 202(a). Section 203 authorizes this Commission to determine the information that must accompany carriers' tariff filings, while Section 204 of the Act empowers this Commission to suspend and investigate proposed rates on our own initiative or in response to a petitioner's request. 47 U.S.C. §§ 203, 204. Should investigation establish the unlawfulness of rates, this Commission may prescribe just and reasonable terms to replace the offending conditions. 47 U.S.C. § 205. Section 214 enables this Commission to control entry into and exit from the interstate market and to control to some extent a carrier's expansion of its rate base. 47 U.S.C. § 214. Title II also permits this Commission to: determine the value of the property a carrier includes in its rate base, 47 U.S.C. § 213; prescribe depreciation rates as well as accounting systems to be used by carriers subject to the Act, 47 U.S.C. § 220; and require such carriers to file any additional information this Commission may need to fulfill our statutory mandate, 47 U.S.C. §§ 213(f), 218.

the flexibility to vary the manner in which such tools are applied according to prevailing circumstances and conditions.[7] Experience and the rapid evolution of the telecommunications industry have compelled us on many occasions to exercise this flexibility by altering or revising our regulatory policies and rules. In each instance, our primary goal has been to determine the most effective methods of policing the requirements in Title II of the Act that rates for interstate services be just, reasonable, and not discriminatory.[8]

6. For the most part, these regulatory methods seek to emulate the operations of a competitive market.[9] Indeed, it has been said that the very purpose of regulation is "to stimulate and substitute the effects of competition and give the consumer the benefits which he would derive from a

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7 The Supreme Court has recognized that the dynamic and rapidly changing nature of the communications industry requires "that the administrative process possess sufficient flexibility to adjust itself to these factors." FCC v. Pottsville Broadcasting, 309 U.S. 134, 138 (1940). See also United States v. Southwestern Cable, 392 U.S. 157 (1968); National Broadcasting v. United States, 319 U.S. 190 (1943). Indeed, "regulatory practices and policies that will serve the public interest today may be quite different from those that were adequate for that purpose in 1910, 1927 or 1945 ...." Washington Util. & Transp. Comm'n v. FCC, 512 F.2d 1142, 1157 (9th Cir.), cert. denied, 423 U.S. 836 (1975).

8 See 47 U.S.C. §§ 201-202.

9 We recognize, of course, that the competitive model may not be sufficient by itself to achieve all the objectives established in the Act. For example, we have construed our mandate under the Act to include the protection of universal service. Notice, 2 FCC Rcd at 5209 (para. 4). Achieving this goal requires us on occasion to exercise our powers under Titles I and II in ways that do not conform to a competitive paradigm. For example, in order to promote universal service among low-income households and telephone subscribers in high cost study areas, including rural subscribers, we designed and implemented Lifeline and High Cost Assistance programs. See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72, 80-286, 2 FCC Rcd 2953, 2955-56 (1987). We also have acted on many occasions to preserve the policy of geographic rate averaging, most recently by modifying the common line pooling process. See id. at 2956-57. Nothing in the price cap plan we propose in this Further Notice undermines our ongoing commitment to universal service.

system of competition."[10] The public interest rationale for attempting to replicate competition is easily understandable. Companies subject to competition are forced to conduct themselves in ways that result in just, reasonable, and non-discriminatory rates. Even though the actions of each company in a competitive market are designed to maximize its profits, the nature of these actions -- cost cutting, innovation, the provision of high quality service -- benefit consumers individually and society as a whole.

7. For the past 20 years, much of this Commission's effort has been devoted to structuring regulatory policies that either affirmatively promote competition in telecommunications or rely upon its existence as an effective regulatory tool. For example, we determined that customer premises equipment (CPE) could be provided on a fully competitive basis, making direct and comprehensive regulation by this Commission unnecessary. Therefore, we ceased regulating the the provision of this service, save for rules concerning technical interconnection standards.[11] We followed this same analytical approach in our Competitive Carrier proceedings, in which we determined that certain carriers' lack of market power made it irrational for these carriers to file rates in contravention of the Act's standards. With regard to such carriers, which we characterized as "non-dominant,"[12] we concluded that the

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10 National Association of Railroad and Utility Commissioners, Proceedings of the Fifty-Third Annual Convention, Report of the Committee on Progress in Public Utility Regulation 369 (1942).

11 This process actually began in the 1950s as a result of efforts by vendors to attach quieting devices to telephone hand-sets. See Hush-a-Phone v. United States, 238 F.2d 266 (D.C. Cir. 1956). It accelerated in the 1960s as a result of this Commission's decision to permit privately-owned equipment to be connected to the public switched network upon a showing that no harm would result therefrom. See Carterphone, 13 FCC 2d 420, recon. denied, 14 FCC 2d 591 (1968). Ultimately, in a proceeding commonly known as the Second Computer Inquiry, we concluded that the provision of customer premises equipment was not a common carrier service, and we required telephone companies to offer such equipment on a competitive basis pursuant to certain safeguards. See Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision, 77 FCC 2d 384, modified on recon., 84 FCC 2d 50 (1980), modified on further recon., 88 FCC 2d 512 (1981), aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC 693 F.2d 198 (D.C. Cir. 1982), cert. denied sub nom. Louisiana Pub. Serv. Comm'n v. United States, 461 U.S. 938 (1983), aff'd on second further recon., FCC 84-190, released May 4, 1984.

12 The policy of classifying common carriers as dominant or non-dominant, in accordance with determinations of their relative market power, was developed in a series of proceedings initiated by this Commission in the late 1970s. The purpose of the proceedings was to adjust rate filing and

cost of regulation outweighed its benefit to the public, and we therefore reduced regulatory requirements for such carriers. In neither instance did we abandon the requirements that rates be just, reasonable, and non-discriminatory. Rather, in both instances we determined that these requirements could be achieved by relying primarily upon competitive forces instead of particular regulatory rules.

8. It is not always possible to rely primarily upon the discipline of competitive forces to achieve the Act's purposes. Certain carriers are considered to have market power sufficient to exploit consumers by, inter alia, charging excessive rates or discriminating unreasonably in the provision of service. We classify such carriers as "dominant," and include within this classification both AT&T and all LECs.[13] Consistent with the Act,

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facilities review procedures to reflect changes in the telecommunications industry over the preceding decade. See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order (First Report), 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order (Second Report), 91 FCC 2d 59 (1981), recon. denied, 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 7308 (Apr. 22, 1982); Third Report and Order (Third Report), 48 Fed. Reg. 46791 (Oct. 14, 1983); Third Further Notice of Proposed Rulemaking, 47 Fed. Reg. 28292 (June 21, 1983); Fourth Report and Order (Fourth Report), 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order (Fifth Report), 98 FCC 2d 1191 (1984); Sixth Report and Order (Sixth Report), 99 FCC 2d 1020 (1985), rev'd and remanded sub nom. MCI Telecommunications v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

13 The Notice suggested that alteration of our loading policy might justify revision of our rules concerning rate regulation of Comsat's jurisdictional services and its inclusion within the price cap scheme. 2 FCC Rcd at 5223 n.14. Although we have ended imposition of circuit distribution guidelines, see Policy for the Distribution of United States International Carrier Circuits Among Available Facilities During the Post-1988 Period, CC Docket No. 87-67, FCC 88-122, released Apr. 14, 1988, and despite Comsat's representations to the contrary, other factors raise issues peculiar to Comsat that cannot be resolved in this Docket. These factors primarily emanate from Comsat's general statutory responsibilities to participate in a "global communications network," 47 U.S.C. § 701(a), and its specific commitment, as the United States Signatory to the Intelsat Operating Agreement, to bear a pro rata share of the costs of Intelsat's investment program. The Notice also tentatively concluded that policies adopted in this Docket would be applied to Alascom. 2 FCC Rcd at 5209 (para. 6). We reaffirm this tentative conclusion to the following extent. Alascom and AT&T each presently concur in the other's MTS and WATS tariffs pursuant to this Commission's rate

regulation by this Commission is necessary to guard against the potential that dominant carriers will exercise their market power to the detriment of consumers.

9. Although the present level of competition, acting alone, cannot discipline dominant carriers effectively, this Commission generally has attempted to draw upon the competitive analytical model in fashioning regulatory policies to constrain their market power. This effort has included attempts to nurture competition through the promotion of open entry into the markets in which such carriers operate.[14] Moreover, through the adoption of various market rules, we have been able to achieve a significant measure of success in assuring that dominant carriers structure their rates in accordance with a competitive model. For example, we prohibit tariff restrictions on the resale or sharing of domestic public switched network service.[15] We also require AT&T and the Regional Bell Operating Companies (RBOCs) to provide Open Network Architecture and Comparably Efficient Interconnection to enhanced service providers.[16]

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integration policies. Should AT&T elect price cap regulation, Alascom would thereby necessarily be included under price cap regulation with regard to most of its facilities, a result that will not disturb the course of rate integration. In order to ensure further that decisions adopted in this Docket do not affect rate integration policies adversely, however, the option of electing price cap regulation will not be extended to Alascom. Therefore, for the above noted reasons, and subject to the preceding conditions, the term "dominant carrier" for purposes of this proceeding encompasses AT&T and local exchange carriers.

14 The process of promoting open entry into the market for what are now considered "basic" telecommunications services began in the 1950s in connection with the licensing of private microwave facilities and expanded thereafter. See Allocation of Microwave Frequencies Above 890 Mc., 27 FCC 359 (1959) (authorizing construction of private microwave systems as an alternative to reliance on common carrier offerings); see also Specialized Common Carrier Services, 29 FCC 2d 870 (1971), aff'd sub nom. Washington Util. & Transp. Comm'n v. FCC, 513 F.2d 1142 (5th Cir.), cert. denied, 423 U.S. 836 (1975).

15 See Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC 2d 167 (1980), recon. denied, 86 FCC 2d 820 (1981).

16 See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 FCC 2d 958 (1986), clarified on recon., 2 FCC Rcd 3035 (1987).

10. Achieving success in assuring that dominant carriers' rate levels are just and reasonable has been more problematic. In this area, our efforts have consisted primarily of administering traditional "rate base, rate-of-return" regulation.[17] This approach not only requires that we determine a carrier's allowable rate of return, but also whether: (1) its investment is properly calculated and efficiently incurred; (2) its cash expenses are efficiently and economically incurred; (3) the level of non-cash expenses such as depreciation and other accruals is properly reflected in rate calculations; and (4) the rates proposed or in effect cover these costs and produce a fair rate of return.[18]

11. Rate-of-return regulation, in theory, is intended to replicate the results of competition. But there are many differences in the manners in which such regulation and competitive forces operate and, consequently, differences in the incentives they create. A competitive market holds each firm to "normal" profit levels as a result of a dynamic process -- firms strive to maximize their profits by achieving advantage over their

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17 In the Notice, we equated the terms "cost-of-service" and "rate-of-return" regulation, and used these terms to describe a comprehensive form of regulation which controls not only a carrier's profit levels, but also the contribution each of its services makes to those profits. See Notice, 2 FCC Rcd at 5209, 5223 (para. 6 & n.13). Although our purpose was to simplify terminology for the reader, various references in the Notice to replacing existing regulation with a price cap approach apparently led some commenters to conclude that we seek in this Docket to abandon costs as a basis for ratemaking. See, e.g., CCTU Reply at 25-27. Such conclusions are erroneous. Indeed, as demonstrated by our discussion in Section II.C.3.a, infra, the goal of this proceeding is not only to ensure that rates are related to costs, but to guarantee that consumers benefit, in the form of lower rates, from the cost cutting activity we expect price caps to stimulate. In view of the apparant confusion, however, we will use the terms "rate base" and "rate-of-return" regulation in this Further Notice when referring to our existing regulatory approach. The use of these terms comports with a more precise definition of that approach. See, e.g., Leventhal, Vitality of the Comparable Earnings Standard for Regulation of Utilities in a Growth Economy, 74 Yale L.J. 989, 991 (1965).

18 See Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975). We currently make these determinations for total interstate operations of AT&T and the access services of the LECs through procedures and proceedings set forth in Part 65 of our Rules. 47 C.F.R. Part 65. We make similar determinations for dominant carriers' individual service offerings through our tariff review process. For a more detailed description of these processes, see the Notice, 2 FCC Rcd at 5209-10 (paras. 7-8).

competitors. This advantage is obtained by cutting costs, innovating, and providing high quality service. Under rate-of-return regulation, on the other hand, "normal" profit levels are secured by regulatory fiat. But while rate of return attempts to approximate the same bottom line result as competition -- "normal profits" -- such regulation does not replicate the dynamic process that produces this result in a competitive market. Indeed, rather than encourage efficient and socially beneficial behavior by the regulated firm, rate of return actually discourages it.

12. The distorted incentives created by rate of return are easily illustrated. In a competitive market, where prices are dictated by the market, a company's costs and profits generally are inversely related. If one goes up, the other goes down. Rate-of-return regulation stands this relationship on its head. Although carriers subject to such regulation are limited to earning a particular percentage return on their investment during a fixed period, a carrier seeking to increase its dollar earnings often can do so merely by increasing its aggregate investment. In other words, under a rate-of-return regime, profits (i.e., dollar earnings) can go up when investment goes up. This creates a powerful incentive for carriers to "pad" their costs, regardless of whether additional investment is necessary or efficient. And because a carrier's operating expenses generally are recovered from ratepayers on a dollar for dollar basis, and do not affect shareholder profits, management has little incentive to conserve on such expenses. This establishes an additional incentive to operate inefficiently. Moreover, in situations in which carriers provide more than one service, rate-of-return regulation also creates an incentive for carriers to manipulate their reported cost allocations.

13. A system that establishes such incentives is not likely to encourage efficiency or innovation. Moreover, no regulatory body is in a good position to counteract these incentives because administering the rate-of-return form of regulation is a complex and difficult process even when done correctly and well. This is so for two primary reasons. First, rate base regulation is built on the theory that a regulator can determine accurately what costs are necessary to deliver service. In practice, however, the regulator is in a difficult position to second guess a carrier's business judgments. This Commission has conducted broad scale rate base investigations only on two occasions, once in the 1930s and again in the 1970s. Neither investigation resulted in significant disallowance of carrier investment.[19]

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19 The inquiry conducted in the 1930s cost millions of dollars and occupied 300 researchers for several years. Although their efforts culminated in the preparation of a voluminous report on Bell System costs and operations, this Commission ultimately declined to act on the report's major recommendations, and the investigation produced no significant changes in either this Commission's or the Bell System's procedures. See FCC, Investigation of the Telephone Industry in the United States (1939) (Walker Report) (Arno Press

Second, rate base regulation requires determinations of how to allocate a carrier's costs among services that often are provided jointly or in common. Such determinations, however, tend to become more economically problematic as they become more detailed. In the 1970s, this Commission experienced some difficulty implementing cost allocation systems.[20] Recently we have been able to implement rational and effective allocation systems for the purpose of allocating costs between regulated and nonregulated activities,[21] but such allocation systems can do no more than assist in the detection of anti-competitive activity. They do not alter the incentives rate of return establishes for the carrier to engage in such activity in the first place.

14. The fact that state, federal, and foreign regulatory bodies are turning to alternatives to the rate base approach provides further evidence that this form of regulation is flawed. Our own experience with rate base regulation, and the prospect of continued, accelerated change in the telecommunications industry, has prompted us to revisit our existing approach to regulating dominant carriers. We seek in this Docket to establish a better regulatory framework, one that can provide consumers high quality telecommunications service at lower rates than likely would be achieved by adhering exclusively to existing methodologies.

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ed. 1974); see generally G. Brock, The Telecommunications Industry: The Dynamics of Market Structure 179-80 (1981). The examination of AT&T's rate base and cost allocation methodologies conducted by this Commission in the 1970s led to certain minor adjustments to AT&T's rate base and the adoption of interim procedures to govern cost allocations among AT&T service categories. See AT&T Long Lines Department, Revisions to Tariff F.C.C. No. 260, Private Line Services, Series 5000 (Telpak), Docket No. 18128, 61 FCC 2d 587 (1976), recon., 64 FCC 2d 971 (1977), further recon., 67 FCC 2d 1441 (1978), aff'd in pertinent part sub nom. Aeronautical Radio v. FCC, 642 F.2d 1221 (D.C. Cir. 1980) (AT&T Telpak Case).

20 The AT&T Telepak Case led to this Commission's conclusion that allocations based on historical cost causations were, in theory, most desirable. This Commission, however, never succeeded in using its preferred methodology to determine lawful rates for AT&T's services. See AT&T, Manual and Procedures for Allocation of Costs, 84 FCC 2d 667 (1981), aff'd sub nom. MCI Telecommunications v. FCC, 675 F.2d 408 (D.C. Cir. 1982).

21 See Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298 (1987) (Joint Cost Order), recon., 2 FCC Rcd 6283 (1987), petitions for further recon. pending, appeal pending, Southwestern Bell v. FCC, No. 87-1764 (D.C. Cir. filed Dec. 14, 1987); see also Annual 1988 Access Tariff Filings, Memorandum Opinion and Order, 3 FCC Rcd 1281, 1287-88 (1987).

15. The price cap approach we reviewed in the Notice seems particularly well suited to achieving this result because it replicates more accurately than rate of return the incentive system prevalent in a competitive market. It achieves this result by creating incentives for carriers to limit the rates they charge. But our proposal[22] should not be viewed as an attempt to "freeze" rates. Although freezing rates would stabilize rates, over time such action would cause rates to depart from underlying costs in an unpredictable manner. This would promote neither consumers' nor carriers' interests. Therefore, as we propose herein, carriers' services will be grouped together and the weighted prices in each group will be adjusted annually pursuant to a formula constructed of: (1) a widely accepted index that measures changes in carriers' costs; (2) expected carrier productivity gains calculated on a long-term basis; and (3) other adjustments reflecting known cost changes outside the direct control of the carriers, such as changes in federal tax laws and jurisdictional separations policies and requirements.[23]

16. This "price cap" approach to regulation replicates the competitive process more accurately because it allows carriers to increase their earnings by innovating in the provision of service and reducing their costs. At the same time, the presence of the cap protects ratepayers by limiting carriers' flexibility to increase earnings by raising prices, padding costs or engaging in cross-subsidization. Moreover, in the long run, this system should be less complex to administer and should reduce regulatory costs. Furthermore, consumers will share the benefits of expected productivity improvements because the price cap rules should result in carriers' prices moving downward each year in real terms to account for these productivity improvements.

17. We seek in this Further Notice to continue the process of translating price cap theories into a workable regulatory system. As discussed more fully below, we tentatively conclude that relatively modest

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22 For a detailed narrative description of the price cap proposal made in this Further Notice, see Appendix B. Proposed amendments to Commission Rules are shown in Appendix E.

23 Pursuant to the dual system of federal and state telecommunications regulation established under the Communications Act, see 47 U.S.C. § 152, telephone company costs are apportioned between state and interstate jurisdictions and recovered thereafter according to applicable federal and state regulatory policies. These apportionments are governed by Part 36 of this Commission's Rules. See 47 C.F.R. § 36.1 et seq. The apportionment process is commonly referred to as "separations," and Part 36 of our Rules is sometimes referred to as the "Separations Manual."

adjustments to existing procedures is all that is required to eliminate substantially the distorted incentives created by rate-of-return regulation and to replace them with more efficiency-oriented and consumer-oriented price cap incentives. Although our proposal is designed to be a permanent replacement for existing rate-of-return regulation, we tentatively conclude that the public interest will be furthered by implementing price caps in a cautious manner, one that preserves existing safeguards and, indeed, provides additional safeguards. Moreover, three years after price cap regulation has been in operation, we propose to conduct a comprehensive performance review to determine what, if any, adjustments are required either to the system itself or to carriers' rates.[24] Throughout this period, we will monitor carriers' earnings, service quality, and other indicators of carriers' performance in order to ensure that price caps are furthering the public interest.

18. In Section II of this Further Notice, we examine the strengths and weaknesses of our current regulatory approach, of alternative regulatory approaches administered by others, and of the price cap approach generally and as applied to the LECs. We tentatively conclude that the public interest will be furthered by permitting dominant carriers the option of electing price cap regulation initially. Although this necessarily means we will be operating rate of return and price cap regulation side-by-side for a brief period, the public interest benefits of proceeding in this cautious manner offset the incremental burden to this Commission of administrating two regulatory systems. We also conclude that both AT&T and all LECs that do not participate in the common line or traffic sensitive pools administered by the National Exchange Carrier Association (NECA) should be provided the opportunity to elect to be governed by price cap regulation.

19. In Section III, we review our legal authority to adopt our price cap proposal, which establishes a "no-suspension" zone that we will use to evaluate carrier-initiated tariff filings involving rate level changes. We tentatively conclude that the Act does not mandate the use of any particular methodology, and that our proposal to use price cap concepts for purposes of reviewing carrier-initiated tariff filings is consistent with the substantive and procedural requirements of Titles I and II of the Act and represents a reasonable exercise of the discretion we are provided thereunder.

20. Section IV is devoted to issues associated with initiating and administering price cap regulation for existing services and those offered subsequently. We tentatively conclude that price cap concepts work most effectively when they are applied most broadly. Therefore, we propose to

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24 We tentatively conclude that three years is sufficient time to permit the accumulation of data sufficient to permit us to conduct a comprehensive review of price cap regulation.

apply caps to almost all services offered by dominant carriers, including new and restructured services. In order to protect consumers, however, we will hold certain services outside the cap for the time being. Such services include those currently accounted for by dominant carriers on a "below the line" basis,[25] as well as the LECs' common line and special construction offerings.

21. We propose to use existing tariffed rates as the initial basis for calculating caps. We also propose to establish within the overall cap system a series of "baskets" and "bands" that would apply to capped rates. These actions are designed to ensure that consumers receive a significant measure of rate stability and protection from potential abuses of market power, while providing carriers adequate incentives to cut costs and the flexibility to adjust their rates each year. We propose to afford streamlined tariff filing treatment in instances in which a carrier's rate levels remain within the boundaries established by this system. We select April 1, 1989, as the target date for initiating price cap regulation for those carriers electing to file tariffs in conformance with our proposed price cap rules.

22. In Section V, we address issues associated with adjusting price caps. In the Notice, we concluded tentatively that caps should be adjusted in accordance with certain factors, such as inflation, expected productivity gains, and other measures of cost changes outside a carrier's control that affect the cost of providing service. We reaffirm this conclusion, and we discuss the specific adjustment factors we propose to use for this purpose. We also discuss other technical issues relating to rate adjustments, and we describe the comprehensive performance review of the price cap system that we will initiate three years after the first date on which rates conforming to the system take effect.

23. In Section VI, we address the impact of price caps on current Commission rules. Our proposal to implement price caps through the tariffing process largely eliminates the need to make wholesale revisions in these rules. For the most part, we propose to amend existing rules so they accommodate the alternative price cap system of regulation we propose herein.

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25 In accounting terminology, a service accorded "below the line" accounting treatment is presumptively excluded from the rate base a carrier uses for ratemaking purposes. Therefore, ordering a service to be accounted for on a "below the line" basis shifts to a carrier's stockholders the burden of any losses resulting from the provision of that service. In recent years, we have occasionally ordered carriers to account for a particular service on a "below the line" basis pending the results of our investigation into the lawfulness of that service. See, e.g., AT&T Communications, Order Designating Issues for Investigation, Tariff F.C.C. Nos. 10 and 12, Transmittal Nos. 895 and 961, 2 FCC Rcd 7389 (1987).

This will leave existing rules and procedures undisturbed and, therefore, fully available for use in regulating carriers that continue under the present system. In order to ensure that alternative regulation presents no threat to telecommunications regulation by the states, no changes will be made to current separations rules or procedures.

II. DOMINANT CARRIER REGULATION

A. Current Approach: Rate-of-Return Regulation

1. Summary of Notice

24. The Notice contained a review of the advantages and disadvantages of our current regulatory approach. This review focused on the promise and the reality of rate-of-return regulation. On the one hand, we observed, rate-of-return regulation promises carriers the opportunity to earn sufficient revenue to cover their costs and achieve a fair return on equity. On the other, it promises to shield ratepayers from the exorbitant rates that a carrier with market power could impose if left unregulated. We noted that, in theory, this approach "seems fair to both the regulated company and its customers."[26] We also suggested, however, that in practice this approach imposes significant costs on regulated firms, their customers, and society as a whole because it (1) encourages rate base padding and harmful cross-subsidization that are difficult to detect; (2) discourages innovation; (3) is costly and difficult to administer; and (4) precludes determinations of whether competitors are entering or exiting a regulated service market because of pricing distortions created by our regulatory procedures. Our analysis drew comments from many interested parties.

2. Pleadings

a. In General

25. All of the Bell Operating Companies (BOCs) and major independent telephone companies, AT&T, some Other Common Carriers (OCCs), some states, some large users, and other commenters generally agree that serious deficiencies in rate-of-return regulation necessitate consideration of an alternative regulatory system.[27] Some of these commenters mention that the current regulatory structure fosters anticompetitive behavior and thwarts the incentive to operate at maximum efficiency.[28] Others contend that rate-

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26 Notice, 2 FCC Rcd at 5211 (para. 17).

27 E.g., BellSouth Comments, App. A at 2-12; US West Reply at 3-12; Pactel Comments at 32-33; Centel Comments at 1; USTA Comments at 2-3; Ameritech Comments at 6; AT&T Comments at i-ii, 28, 36; MCI Comments at 15; Ad Hoc Reply at 4; United Airlines Comments at 1; DOJ Reply at 25; Illinois Comments at 6-10; Michigan PSC Comments at 6.

28 BellSouth Comments, App. A at 10 (testimony of Kahn and Shew). See also DOJ Reply at 25 (even if cost shifting could be prevented, carriers would still have the incentive to inflate the rate base or forego cost efficiency).

of-return regulation is inappropriate in the increasingly competitive telecommunications industry.[29]

26. Some consumer groups, states, and other commenters emphasize the benefits of rate-of-return regulation.[30] CFA, for example, argues that the performance of the telecommunications industry under rate-of-return regulation has been excellent. CFA claims that rate-of-return regulation has produced "stable and declining rates," and "continuous increases in the percentage of households with telephone service."[31] CFA also notes that productivity growth and research and development expenditures in the telecommunications industry have far outstripped the national average, that "capital accumulation and rates of return have been strong," and it contends that these successes are attributable to rate-of-return regulation.[32] Other commenters echo CFA's analysis, and advocate retention of rate-of-return regulation, contending that it has been and can remain a successful regulatory approach.[33]

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29 US West Reply at 3; BellSouth Comments, App. A at 10-11 (testimony of Kahn and Shew); MCI Comments at 15.

30 E.g., Rollins Comments at 1-2; Arkansas PSC Comments at 2-3; Maryland PC Comments at 5-6, 22; Indiana UCC Comments at 2-3. Comptel recognizes the deficiencies of the current system, but states that it has achieved substantial benefits for consumers, including development of competition, reductions in interstate rates, and preclusion of AT&T from supra-competitive profits. Comptel Comments at 3. AARP suggests that this Commission wait three to five years before making a major regulatory change, noting that rates have fallen 34 percent since 1984. AARP Comments at 3-4.

31 CFA Comments at 15-17.

32 Id. at 17-21.

33 NASUCA Comments at 8-11; Citizens Comments at 19. Citizens of Florida also points out that productivity in the telecommunications industry has historically exceeded the national average and contends that rate-of-return regulation will allow customers to realize productivity increases via reduced rates. Citizens Reply at 3-4. Comptel asserts that rate-of-return regulation has provided this Commission with objective criteria to judge whether the rates of the LECs are reasonable. Comptel Reply at 28. ADAPSO believes that rate-of-return regulation has maintained reasonable rates for users while fostering the goal of universal service and guaranteeing investors a reasonable return. ADAPSO Reply at 2. Ad Hoc contends that the Notice paid too little attention to the benefits provided by rate-of-return regulation. Ad Hoc Reply at 3.

27. Some commenters acknowledge that the current scheme is deficient, but disagree that its deficiencies warrant a systemic change. These commenters argue that this Commission should commit to improving rate-of-return regulation rather than eliminating it.[34] Similarly, some parties take issue with the manner in which the present system is administered. They assert that the problems with the current system are not inherent in rate-of-return regulation and could be resolved through procedural changes. ICA, for example, suggests that the primary deficiency of the current system is this Commission's lack of commitment to tariff oversight.[35]

b. Specific Issues

28. AT&T, most BOCs, major independent and small telephone companies, some OCCs, some enhanced service providers, and some states and cities agree with the Notice that rate-of-return regulation imposes significant administrative costs. These commenters contend that rate-of-return regulation is a complex and cumbersome process for both this Commission and the carriers.[36] Their views are not universally held, however. Several states, consumer groups, and other commenters disagree with the assessment in the Notice that the administrative costs of rate-of-return regulation exceed those that would occur under price cap regulation.[37] Some of these

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34 Maryland PC Reply at 2; Arkansas PSC Comments at 3; Hawaii Reply at 2. Arkansas also notes that rate-of-return regulation is a proxy for competition and that it has not been shown that any of the proposed markets are competitive. It contends that an alternative form of regulation may not be as effective in preventing monopoly profits. Arkansas PSC Comments at 4. NTN agrees, and states that this Commission has not carried out its obligation to protect and foster competition under rate-of-return regulation and will not be able to do so under price caps. NTN Comments at 2-3.

35 ICA Comments at 6-21; see also IDCMA Comments at 5-8 (discusses deficiencies of existing tariff filing system).

36 AT&T Comments at 22, App. B at 5 (testimony of Schmalensee); Pactel Comments at 20; US West Comments at 5 n.6; Bell Atlantic Comments, Attachment II at 4-5 (testimony of Carlton); GTOC Reply at ii; United Comments at 4; Contel Comments at 4-5; Centel Reply at 2-3; Taconic Comments at 3-4; USTA Comments at 2-3; US Sprint Comments at 2; EDS Comments at 4; CCIA Comments at 6; DOJ Reply at 27; Illinois Comments at 9-10; Michigan PSC Comments at 6; NY EnerTel Comments at 9. Oftel, while not directly addressing the costs of rate-of-return regulation, cites the British experience to demonstrate that administrative costs of the price cap mechanism are low. Oftel Comments at 2.

37 NASUCA Comments at 8-11; CFA Comments at 36; Citizens Comments at 7. CCTU contends that this Commission should compile a complete record containing

commenters contend that such costs are inherent in any form of regulation and imply that they can be reduced without abandonment of the current system.[38]

29. Many commenters suggest that the current system of regulation encourages rate base inflation because any improvement in earnings above the permitted rate of return must be passed through to ratepayers.[39] Other parties concede a tendency toward rate base padding, but assert that it can be controlled under rate-of-return regulation.[40] The New York DPS contends that rate base padding can be "minimized by making the hard decision to allow only clearly necessary investments."[41] Some commenters, however, submit that rate-of-return regulation does not foster rate base inflation.[42] In particular, CFA notes that empirical tests of the so-called "Averch-Johnson" theory -- which holds that rate-of-return regulation is likely to distort the regulated

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evidence quantifying the losses attributable to rate-of-return regulation as well as the benefits of price caps. CCTU Reply at 15.

38 ADAPSO Comments at 3; ICA Comments at 20-21; Kentucky PUC Comments at 3.

39 AT&T Comments at 25; BellSouth Comments at 8-9; United Comments at 6; US Sprint Comments at 3; DOJ Reply at 23; Alabama PSC Comments at 4; Michigan PSC Comments at 6; NY EnerTel Comments at 6. (The ETI Report was submitted by both Ad Hoc and ICA. The Report hereinafter will be cited in conjunction with the Ad Hoc pleadings.) United notes that LECs do have some incentive to control costs and improve efficiency due to consumer resistance to rate increases, regulatory pressure, and competition but that such incentives are weaker under rate-of-return regulation than they would be under price caps. United Comments at 6. The ETI report urges that unless price caps create incentives to reduce current excess investment at the outset, the plan will be "stillborn." Ad Hoc Reply, ETI Report at 11. Centel is noncommittal as to whether rate-of-return regulation leads to rate base inflation, but asserts that if price caps are merely an additional layer of regulation, rate base inflation will be encouraged. Centel Reply at 4-5.

40 ADAPSO Comments at 3; Citizens Comments at 3-4; Hawaii Reply at 6. See also Ohio OCC Reply at 9-10 (sees no evidence of rate base padding but argues that if it does occur, it can be corrected under rate-of-return regulation).

41 New York DPS Comments at 3.

42 US West Reply at 11 (although rate-of-return regulation is flawed, it does not necessarily lead to rate base inflation); CP National Comments at 4-5; ALC Comments at 26; CFA Comments at 24-26, 29-30; NASUCA Comments at 9; Kentucky PSC Comments at 4; Colorado PUC Comments at 11-12.

firm's choice of inputs (i.e., results in rate base padding) -- are ambiguous, and produce no clear basis for rational policy making.[43]

30. Several commenters maintain that cross-subsidization is a significant threat under rate-of-return regulation.[44] For example, one of the consultants filing comments on behalf of AT&T contends that under the current regulatory system, prices are intended to be set equal to estimated average costs, but the presence of joint and common costs makes it impossible to define the average cost of a single product. As a result, the regulated firm may have incentives to distort the allocation of costs if regulatory lag or errors in setting the rate of return present profit opportunities.[45] The consultant asserts that this result is exacerbated where a regulated firm faces unregulated competitors, or is only partially regulated.[46] Other commenters believe that cross-subsidization exists but can be prevented under the current regulatory approach. ADAPSO, for example, contends that carriers' incentives to shift costs "are not incapable of regulatory review ... but can be addressed through active and consistent oversight."[47]

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43 CFA Comments at 24-25 & n.12; accord Iowa Comments at 8; Indiana Comments at 3.

44 Bell Atlantic Comments at 6; BellSouth Comments at 8-9; USTA Reply at 16; US Sprint Comments at 3; GSA Comments at 5; EDS Comments at 7-8; ADAPSO Reply at 4; CCIA Comments at 7; DOJ Reply at 25; Illinois Comments at 8; Michigan PSC Comments at 6; NY Enertel Comments at 9.

45 AT&T Comments, App. B at 10-11 (testimony of Schmalensee).

46 Id., App. B at 12-13, 17-18. Others testifying on behalf of AT&T agree that rate-of-return regulation becomes unworkable when only some of a firm's services are regulated. Id., App. C at 10 (testimony of Baumol and Willig). They note that suspicion of cross subsidy is impossible to test under rate-of-return criteria. Id., App. C at 11. Accord NYNEX Comments, App. B at 6 (testimony of Levin).

47 ADAPSO Comments at 3. United agrees that cross-subsidization is present under the current system, but asserts that its internal accounting controls and proposed cost manual guard against such behavior. United Comments at 8. It concedes, however, that maintenance of these procedures increases operating costs and suggests that these costs could be eliminated under price cap regulation. Id. Western Union acknowledges the existence of cross-subsidization due to competition, but opposes price caps for the LECs. Western Union Comments at 6.

31. Most parties agree that rate-of-return regulation has stifled efficiency and innovation.[48] Some of these commenters are concerned that the United States telecommunications industry will lag behind other industrialized nations as a result of current regulatory policy.[49] Other commenters are less assertive regarding the prevalence of inefficiency or lack of innovation. For example, US West argues that the problem is overstated in light of this Commission's insistence upon prudent investments and expenses. Nonetheless, it asserts that the perception that such incentives exist supports development of alternatives to traditional regulation.[50] Some commenters favor dealing with the problem under the current regulatory system. For example, Western Union points to the enforcement mechanism for the rate-of-return prescription and this Commission's failure to require full cost justification for mid-course filings as procedures which could be modified so as to alleviate the problem of decreased innovation and efficiency.[51]

32. Various commenters argue that rate-of-return regulation is deficient in ways not discussed in detail in the Notice. For example, some parties maintain that rate-of-return regulation is subject to political influence.[52] Other parties contend that the current regulatory framework

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48 AT&T Comments at 2; BellSouth Comments at 8-9; Bell Atlantic Comments at 13; SWB Comments at 16-17; NYNEX Comments, App. B at 6-7, 9-10; USTA Comments at 2-4; Centel Reply at 3-4; EDS Comments at 7; Delta Comments at 1; Ad Hoc Reply, ETI Report at 4; DOJ Reply at 23; Michigan PSC Comments at 7-8; Illinois Comments at 9.

49 NYNEX Comments, App. C at 1 (testimony of Davidson); IBEW Comments at 1.

50 US West Comments at 4-5 & n.7.

51 See Western Union Comments at 5-6. Subsequent to the filing of Western Union's comments, the United States Court of Appeals for the District of Columbia Circuit found unlawful the refund requirements established as part of this Commission's rate-of-return enforcement mechanism. AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988) (per curiam) (Rate-of-Return Decision).

52 The Michigan PSC contends that rate-of-return regulation gives intervenors inordinate political power by providing special interest groups with the opportunity to "spend money profitably in order to benefit at the expense of their less organized rivals." Michigan PSC Comments at 7. It submits that such groups have become a major force in determining public utility rates. Id. Testimony included in Ameritech's comments cites a 1978 study indicating that public utility commissioners with longer terms allowed higher rates of return. Ameritech Comments, App. B at 7 (testimony of O'Conner, Keenan, and Case).

promotes price instability because it encourages carriers to target and retarget their rates in an effort to maximize the possibility of achieving their authorized rate of return while minimizing their potential refund liability.[53] Finally, some commenters imply that rate-of-return regulation fosters bypass of the public switched network because it generally entails the recovery of interstate revenue requirements allocated to services on a fully distributed cost basis.[54]

3. Discussion

33. Our analysis of current regulation in the Notice noted the existence of a shortfall between the promise of rate-of-return regulation and the benefits it obtains in practice. The commenters generally recognize that a shortfall exists, but they disagree sharply about its underlying causes, its overall size, and the most appropriate means of addressing the disparity between the promised and realized benefits of this approach. We tentatively conclude in this Further Notice that rate-of-return regulation is flawed and that the appropriate course of action is to develop and implement a carefully structured voluntary price cap approach that, in addition to being monitored on an on-going basis, will be comprehensively examined after three full years of its operation. We begin by examining the more extreme positions taken by commenters.

34. A collection of commenters, including the CFA, appears to argue that rate of return represents optimal regulation. In support of their argument, they note that the public switched network in the United States historically has had no peer world-wide in terms of its scope and quality. They point as well to the nearly complete achievement of universal service since World War II, and they state that the telephone industry's capital accumulation and rates of return during this period have been strong. Even if one assumes, arguendo, that each of these observations is accurate, it does not follow from such observations that rate of return represents optimal regulation.

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53 E.g., US West Comments at 13-15.

54 See generally Ameritech Reply at 19-21; see also US West Comments at 9-13 (because rates are the result of regulatory compromise and allocation, strict cost requirements are irrelevant in describing interstate revenue requirements). United contends that the requirements of prior notice and agency approval for price and service changes prevent LECs from responding effectively to competition and may lead to bypass of local facilities. United Comments at 9 (citing National Telecommunications and Information Agency, Regulatory Alternatives Report, 17 (1987)(NTIA Report)).

35. If rate-of-return regulation were responsible for all achievements realized in telecommunications during the past decades, one would expect other industries subject to this form of regulation in the post-war era to have experienced similar achievements. But this is not the case. CFA itself admits that rate-of-return regulation of the electric utilities industry has not yielded optimal results.[55] And there is no evidence to suggest that application of rate-of-return principles in connection with the regulation of railroads during this period produced results comparable to the achievements in telecommunications. Indeed, the troubled history of the railroad industry under rate-of-return regulation belies any such suggestion.[56]

36. The other portions of these commenters' argument are similarly flawed. Significant strides towards the achievement of universal service have been made in foreign nations where rate-of-return regulation as practiced in the United States is largely unknown,[57] undercutting the suggestion that advances towards universal service are directly attributable to rate-of-return regulation. Finally, we cannot determine the connection between CFA's observation that the telecommunications industry has been able to make large capital investments while subject to rate-of-return regulation and its conclusion that rate of return represents effective regulation. The industry's ability to raise capital under rate-of-return constraints demonstrates that authorized rates of return were not set too low during this period, and nothing more. It certainly does not support an argument that this regulatory approach, in and of itself, represents effective regulation.

37. The remaining commenters who question our assessment of the deficiencies of rate-of-return regulation contend there is little evidence suggesting these shortcomings are significant or could not be corrected through the application of traditional tools. We turn now to an examination of the first of these contentions.

38. Rate-of-return regulation attempts to restrain the exercise of dominant carrier market power by trying, through regulatory means, to limit a

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55 CFA Comments at 13.

56 We note that several railroads went bankrupt during the tenure of rate-of-return regulation in the railroad industry and that productivity in the industry generally was quite low. See Economic Report of the President, H.R. Doc. No. 99-142, 99th Cong., 2d Sess. 163-64 (1986); see generally Moore, Deregulating Surface Freight Transportation, in Promoting Competition in Regulated Markets (1975).

57 See NTIA Report at 15.

regulated firm to the "normal" profits it would earn if the market were fully competitive. Although the operation of such regulation may duplicate this outcome of the competitive process, in so doing it supresses another facet of competition, one that we believe is critical to the maximization of consumer welfare. This is the dynamic aspect of competition that causes each firm constantly to seek out cost savings, demand opportunities, and innovations that allow it to gain advantage over competitors, or at least to keep up with others who are themselves striving for advantage. This process results in each firm minimizing its long-run cost of production, and it is this incentive to operate efficiently that is at least partially sacrificed under rate-of-return regulation. A standard textbook on the economics of regulation explains this dilemma:

> The negative character of a regulatory process that concentrates mainly on the rate of return on aggregate company investment entails several inadequacies or adverse consequences. It means that regulation as such contains no built-in mechanism for assuring efficiency. ... [It] tends to take away any supernormal returns [the companies] might earn as a result of improvements in efficiency, thereby diminishing their incentive to try. And if it permits them to earn only the cost of capital, it creates a situation in which any inefficiencies can simply be passed on in higher rates without injury to existing stockholders. Indeed, it creates strong incentives on the part of the companies to pad their expenses ....[58]

39. As observed in this explanation, rate-of-return regulation provides regulated firms with very strong incentives to pad their rates, for essentially two reasons. First, as a profit-maximizer, the firm is led to adopt the most costly, rather than the most efficient, investment strategies because its primary means of increasing dollar earnings under rate-of-return constraints is to enlarge its rate base. This is commonly known as the Averch-Johnson effect or "A-J" effect of rate-of-return regulation.[59] Second, since all operating expenses are included in a firm's revenue requirement under rate of return, management has little incentive to minimize operating

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58 A. Kahn, The Economics of Regulation 48 (1971).

59 The name refers to two economists who first described this incentive. See Averch & Johnson, Behavior of the Firm Under Regulatory Constraints, 52 Amer. Econ. Rev. 1052 (1962). According to Averch-Johnson, carriers have an incentive to adopt inefficient, capital intensive approaches to business operations when the allowed rate of return exceeds the cost of capital, and to adopt inefficient, labor intensive approaches when the cost of capital exceeds the allowed rate of return.

costs. This is commonly known as "X-inefficiency."[60] The firm's shareholders profit from the first phenomenon, and the benefits of the second redound to the firm's management. In both cases, however, consumers suffer because these distorted incentives increase the cost of doing business -- and thus the rates consumers must pay for service.

40. No commenter offers evidence questioning the existence of the distorting effects of X-inefficiencies. Some commenters, however, note economic studies indicating that the A-J effect is difficult to detect and quantify.[61] Other studies strongly demonstrate the presence of A-J-type distortions, including one showing unit cost increases on the order of 6 to 12 percent.[62] The differences between these studies are attributable to many factors, including the fact that they sometimes are based on different assumptions about the importance a firm places on maximizing profits. In a theoretical model, these different assumptions can have pronounced effects on results. In the real world, almost all dominant carriers are public corporations operating on a "for profit" basis, and, as such, we think it reasonable to assume that they respond to profit-maximizing incentives. Therefore, given a system like rate of return -- in which a carrier's percentage profit is capped but its dollar earnings can be increased through additional investment -- it requires no leap of faith or logic to conclude that such a carrier likely will respond by attempting to increase its investment base.[63] Moreover, the demonstrated presence of either type of

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60 See Leibenstein, Allocative Efficiency vs. X-Efficiency, 56 Amer. Econ. Rev. 392, 392-415 (1966).

61 E.g., CFA Comments at 24-25 & n.12.

62 Courville, Regulation and Efficiency in the Electric Utility Industry, Bell J. of Econ., 53-74 (1974). Accord Spann, Rate of Return Regulation and Efficiency in Production: An Empirical Test of the Averch-Johnson Effect, Bell J. of Econ., 38-52 (1974); Peterson, An Empirical Test of Regulatory Effects, Bell J. of Econ., 111-26 (1975); Hayashi & Trapani, Rate of Return Regulation and the Regulated Firm's Choice of Capital Labor Ratio, Southern J. of Econ., 384-98 (1976); Atkindson & Halvorsen, A Test of Relative and Absolute Price Efficiency in Regulated Industries, Rev. of Econ. & Statistics, 81-88 (1980); Gegax & Tschirhart, An Analysis of Interfirm Cooperation, Southern J. of Econ., 1077-97 (1984).

63 It has long been recognized that firms seek ways around regulatory constraints placed on their profits. For example, in England,

> [i]n 1844, at the instance of Mr. Gladstone, a law was enacted which contained a clause of general operation, practically, in the view of railway directors, limiting their dividends to ten per cent per annum upon the stock of their roads. This particular feature

distortion would justify efforts to improve the current regulatory system, because consumers are indifferent to whether higher than economically rational rates are the result of the A-J effect or X-inefficiencies. And as discussed below, the existence of both distortions can be demonstrated on the basis of this Commission's experience, and by analogy to comparable experiences.

41. This Commission regularly exercises its authority under the Act to disallow "padded" rates. In the past two years alone, we have disallowed more than $163 million in dominant carrier investments and ordered switched access charge reductions totalling nearly $900 million -- a total of over $1 billion.[64] In each instance we concluded that carriers were attempting to pad rates by including in their rate calculations investments or expenses that were deemed unnecessary to the efficient conduct of their

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of an otherwise well-considered act led to results in no way anticipated. Not only did it go far towards bringing on the railroad mania of 1845, which was comparatively a small matter, but it introduced into England the practice of what has since been known as stock watering -- one of the most ingenious and oppressive forms of burdening the growth and industry of a people and of mortgaging future development which have ever been devised. C.F. Adams, "Railroad Inflation," The North American Review, 137 (Jan. 1869).

It has been observed that one problem with the 10 percent profit limitation was that "[i]f a corporation earns a 10 percent rate of return on its capital by doing a certain amount of work, then it has no incentive to do more than a certain amount, or to do even that same work with greater efficiency." T.K. McCraw, Profits of Regulation 13 (1984).

64 See Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, FCC 86-52, released Jan. 24, 1986 ($26.75 million associated with polyethylene shielded video cable); AT&T Communications, 2 FCC Rcd 1593 (1986)($25 million associated with transponder); Annual 1987 Access Tariff Filings, 2 FCC Rcd 866 (1986)($76 million associated with inside wire; $302 million in switched access rate adjustments); Annual 1988 Access Tariff Filings, DA 87-1876, released Dec. 24, 1987 ($8 million excessive cash working capital; $28 million furniture and equipment; $583 million in switched access rate adjustments). The switched access rate adjustments were required to correct rate padding which resulted from inaccurate demand projections made by the LECs for the test years involved. The other examples involve rate base padding resulting from unnecessary investment or expense actions taken by the carriers. Both types of actions reflect the deleterious effect of incentives created by rate-of-return regulation.

operations. As discussed more fully below, however, we lack the requisite information to determine in each instance whether rates are "padded," and, hence, some "padding" goes undiscovered.

42. Another example of the inefficient incentives established by rate-of-return regulation is available by analogy to the Defense Department's procurement process. Government procurement of defense materiel has long been conducted on the basis of contracts negotiated between the Department of Defense and individual suppliers because many defense goods are specialized and are provided exclusively to the Federal Government as sole user. Until very recently in the Nation's history, most of these contracts were of the "cost-plus" variety. A cost-plus contract usually begins with an estimate of actual production costs, but the estimate is not binding. Rather, the buyer agrees to reimburse all costs actually incurred by the seller, and to add an appropriate profit margin.

43. There are obvious parallels between rate-of-return regulation and defense contracting. In many ways, rate-of-return regulation is analogous to a cost-plus contract, since all costs that can reasonably be represented as necessary to production generally become part of the firm's revenue requirement and are collected from ratepayers. Thus, the regulated firm is protected or insured against any diminution of its profit level regardless of the magnitude of costs it incurs. The incentive effects under the two regimes are much the same, namely, eliminating most, if not all, of the reasons for the firm to strive for productive efficiency. As a result, the concerns over cost-plus contracting that have long been expressed and analyzed would appear to be directly applicable to rate-of-return regulation.

44. More importantly for present purposes, evidence concerning the effects of structuring defense procurement on the "cost-plus" model illuminates the degree of inefficiencies created by such arrangements. A U.S. Air Force study of 171 cost-plus defense contracts demonstrated cost overruns averaging 18 percent, and a broader Department of Defense study indicated that two of every three cost-plus contracts resulted in overruns.[65] More recently, a General Accounting Office study estimated cost inefficiencies of 5 percent from cost-plus contracting.[66]

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65 For a discussion of these studies, see F.M. Scherer, The Weapons Acquisition Process 153-57 (1964).

66 United States General Accounting Office, Defense Industry Profit Study (1971). For an extensive bibliography of the literature on this subject, see Hiller & Tollison, Incentive Versus Cost-Plus Contracts in Defense Procurement, J. of Indus. Econ., 247-48 (Mar. 1978).

45. Quantifications of the inefficiencies established by "cost-plus" or rate-of-return regulation also are available from other sources. For example, comparisons have been made of monopoly electric utilities subject to rate-of-return regulation in relation to such utilities in situations in which some competitive forces exist. Holding other factors constant, one such study found a unit cost differential of approximately 11 percent.[67]

46. The distorted efficiency incentives established by rate-of-return regulation also may have a negative effect on innovation. Clearly, rate-of-return establishes no incentive to "do the same old thing a better way" -- for example, by providing the same service at lower cost -- because a carrier's reward for such innovation under rate-of-return regulation is a reduction in its dollar earnings. Such regulation may well have similar effects on incentives to produce new products and services. NTIA notes that the profit limitations imposed under rate base regulation may limit a firm's incentives to engage in research and development:

> [t]he payoff structure often becomes asymmetric; that is, the costs of unsuccessful innovation are borne by shareholders, while a substantial share of successful innovation will ordinarily be captured by regulators and committed to ratepayer advantage.[68]

47. The limit on the ability of a carrier to earn returns on risky investments comparable with such risks, together with the potential that an unsuccessful project will result in cost disallowance, provide a reasonable basis to conclude that carriers have reduced incentives to undertake such risks under rate-of-return regulation. At best, rate-of-return regulation is "passive" vis-a-vis innovation, neither fostering nor encouraging it. We think the public interest is better served by the adoption of regulatory methods more attuned to stimulating innovation. As we have noted in another context, the Nation's economy is increasingly based on information services and related products, and dominant carrier networks are the backbone connecting nearly all such services and products. Failure to stimulate innovative uses of these networks ultimately may generate very high costs.[69]

48. As we observed in the Notice, rate-of-return regulation creates problems other than encouraging inefficiency and failing to stimulate

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67 See Primeaux, An Assessment of X-Efficiency Gained Through Competition, Rev. of Econ. & Statistics (Feb. 1977).

68 NTIA Report at 19.

69 See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2953 (1987).

innovation. Carriers subject to this regulatory approach have an incentive to shift some of the costs of providing unregulated competitive services to regulated services, where they can be recovered from ratepayers rather than the consumers of competitive services who rightfully should bear these costs. In so doing, the carrier can increase its profits and simultaneously disadvantage its competitors. Since such allocations are driven by the objective of achieving strategic advantage over a rival, without regard to efficiency, they likely increase carrier costs overall. Rate-of-return regulation also generates very high administrative costs, all of which ultimately are borne by ratepayers either in the form of taxes (to support this Commission) or telephone rates (because the cost of complying with regulation is an expense included in carriers' revenue requirements). As competition grows, so, too, do the incentive to shift costs and the administrative costs of deterring carriers from acting on this incentive.

49. No commenter seriously questions the existence of the strong incentives for rate padding or cross-subsidization created under rate-of-return regulation. Nor does any commenter dispute our claim that the aggregate cost of regulation is quite high. Many commenters contend, however, that rate-of-return regulation provides this Commission with all the tools necessary to correct these deficiencies and those we discussed above. In theory, this may be correct. We have authority to disallow padded rates, order refunds of excessive rates in certain circumstances,[70] establish accounting procedures and cost allocation rules designed to prevent cross-subsidization, and adopt administrative procedures designed to reduce the cost of regulation.

50. As a practical matter, however, this Commission cannot micromanage the business operations of every dominant carrier -- well over 1400 entities -- to prevent rate padding by determining if equipment is overdesigned, networks overbuilt, or every operating expense prudently incurred. The costs these carriers incur largely are the result of numerous, discrete decisions made daily by thousands of different company employees. For example, the development of AT&T's 1988 capital program involved tens of thousands of work orders, each subject to engineering and management judgments that have an effect on costs. The construction cost of just the lines and associated facilities in this budget totals $262.2 million. Budgetary restraints would preclude us from hiring the personnel needed to perform even the most cursory review of all the decisions underlying carriers' budgets.[71]

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70 As we have noted, however, our flexibility to effectuate such refunds in an administratively efficient manner may be limited as a result of the recent Rate-of-Return Decision.

71 The problem becomes all the more obvious when one considers that the this Commission's Common Carrier Bureau consists of 350 persons, while many of the dominant carriers we would be second-guessing have more than 100,000

51. Even if adequate personnel were available, this Commission would need to know as much as the carriers know about their costs, demand conditions, and marketing and product opportunities in order to evaluate their business operations effectively.[72] But no regulator could acquire such knowledge, particularly in a market changing as rapidly as telecommunications. Moreover, the information we currently acquire often is not as meaningful as assumed. Much of these data are the products of cost allocation rules and procedures that tend to become more economically questionable as they become more detailed. And a number of difficult and subtle issues arise when a regulator attempts to secure and review the kind of "perfect" information that would be needed to render rate-of-return regulation foolproof. These real world constraints undercut any assertion that "making the hard decision to allow only clearly necessary investments" is all that is required to promote efficient carrier operations under rate-of-return regulation.[73]

52. For similar reasons, we disagree with those who suggest that cross-subsidization can be addressed easily under rate-of-return regulation through "active and consistent oversight."[74] Such claims understate the difficulties inherent in oversight activities and ignore the long history of these difficulties. Concerns about different kinds of cross-subsidization have, in a very real sense, dominated federal telecommunications regulation since the advent of competition in the 1950s,[75] and were determined to be so intractable as to justify in many minds the draconian solution of divestiture

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personnel.

72 We also note that, were sufficient personnel available to micromanage carrier operations, this approach to regulation would generate significant costs because it would substantially reduce carriers' managerial incentives and effectively turn the carriers into public corporations.

73 New York DPS Comments at 3.

74 See ADAPSO Comments at 3.

75 See generally AT&T Long Lines Department, Revisions of Tariff F.C.C. No. 260, Private Line Services, Series 5000 (TELPAK), Docket No. 18128, 61 FCC 2d 587 (1976), recon., 64 FCC 2d 971 (1977), further recon., 67 FCC 2d 1441 (1978), aff'd in pertinent part sub nom. Aeronautical Radio v. FCC, 642 F.2d 1221 D.C. Cir. 1980); AT&T: Charges for Interstate Telephone Services, Docket No. 19129 (Phase II), 64 FCC 2d 1 (1977); Joint Cost Order; Amendment of Section 64.702 of the Commission's Rules and Regulation (Third Computer Inquiry), Report and Order, 104 FCC 2d 958 (1986), modified on reconsideration, 2 FCC Rcd 3035 (1987), aff'd on further reconsideration, FCC No. 88-9 (released Feb. 18, 1988).

of the Bell System.[76] During the past few years, of course, we have implemented a number of regulatory techniques to discourage cross-subsidization between regulated and unregulated activities and to improve our oversight capabilities. We have promulgated cost allocation and affiliate transaction rules,[77] required the largest dominant carriers to file cost allocation manuals for our approval,[78] initiated an extensive monitoring program,[79] mandated annual audits of the largest dominant carriers by independent auditing firms, and required that the results of such audits, as well as the work papers associated with them, be made available to this Commission.[80] While these steps will act as a strong deterrent to cross-subsidization activities, our policies and programs can do no more than deter and attempt to detect such activities, they cannot eliminate the powerful incentive that rate-of-return regulation establishes to engage in cross-subsidization.

53. Application of the standard tool available under rate-of-return regulation to combat cross-subsidization -- cost allocation rules conforming to fully distributed cost (FDC) standards -- also may become counterproductive as competition in telecommunications markets increases. FDC standards generally are based on historical or embedded costs, but current or anticipated costs and revenues are generally the relevant factors influencing business decisions to enter markets and price products.[81] Holding dominant carriers to such cost allocation standards when they face competition from other suppliers actually can result in a price umbrella for less efficient competitors, thus creating the illusion of competition when, in fact, what actually is occurring is a misallocation of resources that results in higher than necessary costs to consumers and society as a whole.[82] Moreover, the

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76 See, e.g., Brock & Evans, Predation: A Critique of the Government's Case in U.S. v. AT&T, in Breaking Up Bell (D. Evans ed. 1983); U.S. Department of Justice, Competitive Impact Statement, 47 Fed. Reg. 7170, 7173 (Feb. 17, 1982)(submitted in connection with the Bell System divestiture proceedings).

77 Joint Cost Order, 2 FCC Rcd 1298 (1987).

78 Id. at 1300 (para. 4), 1327-28 (paras. 232-236).

79 See Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, 2 FCC Rcd 5770 (1987).

80 Joint Cost Order, 2 FCC Rcd at 1330-31 (paras. 256-259).

81 See MCI Telecommunications v. AT&T, 708 F.2d 1081, 1116-17 (7th Cir. 1982).

82 See id. at 1117; Guidelines for Dominant Carrier's MTS Rates and Rate

use of FDC leads to the imposition of complex and rigid rate structures, structures that have no claim to economic rationality. Some rates may be too high, others too low. Either result leads to distorted consumption decisions, distorted production decisions, and distortions of the competitive process.

54. The commenters also ignore recent developments in the case law that limit this Commission's ability to enforce rate-of-return regulation effectively. For example, one recent decision suggests that a utility may need to establish no more than that a particular investment was "prudent when made" in order to retain such investment in its rate base.[83] This standard tilts heavily in the carriers' favor,[84] and arguably limits disallowances of items already in the rate base to instances of flagrant rate base padding. In other words, a carrier could operate at fairly high levels of inefficiency and not be subject to disallowance. And this Commission's efforts to assure refunds in instances in which tariff rates, despite our best review efforts, result in revenues exceeding the authorized rate of return must now be reevaluated in light of a recent determination that our automatic refund mechanism -- which was an effort to establish an effective and administratively efficient means to enforce the prescribed rate of return -- is unlawful.[85]

55. We also take issue with commenters who are unconcerned about the high administrative costs of rate-of-return regulation because such costs are relatively low compared to total industry revenue requirement. This argument misses the mark, for two reasons. First, although many of these commenters claim that the costs of administering rate-of-return regulation can be reduced, they do not state specifically how this could be accomplished. Second, as we observed in the Notice, this form of regulation is inherently expensive because it requires a tremendous volume of cost and earnings data, and a large number of carrier filings and reports. NTIA estimates that the cost of such regulation likely is $1 billion annually.[86] Although this figure may appear modest in comparison with total regulated revenue, the more relevant observation is that such costs add nothing to final product value and society would benefit if they were reduced.

Structure Plans, Memorandum Opinion and Order, CC Docket No. 84-1235, FCC 85-540 (released Oct. 17, 1985) at para 19.

83 See Jersey Cent. Power & Light v. FERC, 810 F.2d 1168 (D.C. Cir. 1987)(en banc)(plurality opinion).

84 Id. at 1191 (Starr, J., concurring).

85 See Rate-of-Return Decision.

86 NTIA Report at 23.

56. It is important to note that our primary disagreement with many commenters is their failure to acknowledge the deficiencies of rate-of-return regulation and the limitations of policies designed to correct these deficiencies through the application of traditional regulatory tools. While we can to some degree tinker with the system in an attempt to improve its effectiveness, we believe that no adjustments can adequately address the inherent flaws of the rate of return approach. It cannot, for example, be adjusted to provide dominant carriers adequate incentives to reduce costs and operate with the greatest possible efficiency -- incentives that we believe are necessary to maximize consumer welfare and to improve the competitiveness of American industry in domestic and international markets. These deficiencies lead us to conclude that this methodology is not the best that we can do, and that the public interest would be better served by attempting to develop more effective means of regulating carriers with market power.

B. Experience with Alternative Approaches

1. Summary of Notice

57. In the Notice, in addition to examining this Commission's current approach to regulating AT&T and the LECs, we also surveyed alternative regulatory approaches implemented by the states and in the United Kingdom. We noted that some multi-LATA[87] states have legislatively provided for removal of rate-of-return constraints on competitive intra-state, inter-LATA toll service. In other states, interexchange carriers are permitted to adjust rates without regulatory approval if these adjustments are within a certain range, referred to as "bands." "Streamlined" regulation, in the form of reduced notice periods, is applied in certain states, while other states have adopted a "social contract" approach to regulation, which requires a measure of price stability from the local telephone company in return for reduced regulation. Still other states have deregulated certain toll or local exchange services entirely.[88]

58. We characterized certain of these alternatives as variations of the price cap approach because, in general, they conform to a regulatory model that places ceilings on a carrier's rates and then adjusts those ceilings periodically to reflect easily observable changes in costs lying beyond the carrier's control. We reviewed in detail two of these alternatives, one administered by the New York State Department of Public Service (New York approach), the other by Oftel, this Commission's counterpart in the United Kingdom (British approach). We sought comment on whether the British, New York, or other alternative approaches could be adapted to our use in a manner that would produce a more efficient and effective method of regulating rates for interstate services provided by dominant carriers.[89] For the reader's convenience, we briefly outline below the New York and British approaches.

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87 The acronym LATA stands for "Local Access and Transport Area" and denotes the area to which the Bell Operating Companies (BOCs) are restricted by the terms of the Modification of Final Judgment (MFJ) as to their post-divestiture provisioning of local telecommunications switching and transmission services. See generally United States v. Western Elec., 569 F. Supp. 990, 993-97 (D.D.C. 1983).

88 See Notice, 2 FCC Rcd at 5211, 5225 (para. 16 & n.41).

89 Id. at 5212-13 (paras. 25-32).

2. Outline of New York and British Approaches

59. Under the British approach, a group of services is made subject to the constraint that the annual change in the weighted average of their prices is limited to three percentage points below the rate of inflation, as measured by the Retail Price Index (RPI), or RPI-3. An attempt was made to separate competitive from non-competitive services, the intention being to "cap" only the latter. The group of services ultimately capped included rentals of residential and business exchange lines, and direct dialed inland services, including both local and domestic toll. Rates for connection charges, international calls, operator services, pay phones, and private line services are not subject to the cap. The RPI-3 formula applies to the weighted average price of all capped services, not to each service individually. The British approach focuses on price levels and imposes no additional constraint on the profits of the "dominant" carrier in the United Kingdom, British Telecom (BT). Under this approach, however, BT's rate of return is monitored as part of the process of assessing the effectiveness of the price cap system.

60. In 1986, New York adopted a moratorium on general rate cases to last until late 1988 that had the effect of capping rates for all services offered by the New York Telephone Company (NYT) other than certain "discretionary" services and new revenue sources. The carrier is permitted to pass through to customers only pre-specified cost increases, including the effect of wage contract negotiations and certain tax, separations, and depreciation rate changes. There is no adjustment for inflation or expected productivity gains. The rate moratorium does not extend to "discretionary" services or new services. Discretionary services include custom calling services, remote call forwarding, TOUCH-TONE Calling, and Centrex lines. The New York DPS found that NYT has a "virtual monopoly on most if not all of the services it listed as 'discretionary,' and w[ould] retain this market dominance during the moratorium."[90] Thus, while the British approach attempts to cap all services over which BT enjoys market power, the New York approach does not. Moreover, the British approach places no express limitations on the regulated firm's earnings, while New York's approach does. Under the New York plan, New York Telephone may retain one-half of any earnings it achieves during the moratorium in excess of its authorized return of 14 percent on the equity portion of its intrastate rate base.

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90 Id. at 5213 (para. 30) (citing New York Telephone, Case 28691, Opinion No. 85-17 (D) (N.Y.P.S.C. May 11, 1987) at 29).

3. Pleadings

a. The British Approach

61. British Telecom offers an analysis of price cap regulation based upon its own experience under this approach. It states that it has realized the advantages of the new regulatory method most strongly in terms of constructive managerial incentives and regulatory efficiency.[91] It further lauds the simplicity of this approach, in which all calculations are retrospective and easily audited so as to reduce the work involved and eliminate estimation.[92] In addition, British Telecom notes that competition has increased under the British approach.[93] Finally, British Telecom observes that since caps were implemented in the United Kingdom in 1984, the RPI has risen 20.1 percent, the price cap formula has increased 6.9 percent, but the actual weighted average price has increased only 5.5 percent -- thus demonstrating the benefits of this approach for consumers.[94]

62. Oftel's comments paint a similarly favorable picture of the operation of price cap regulation in the United Kingdom. Oftel contends that the price cap plan it administers has produced fair prices for consumers, prevented the regulated firm from earning monopoly profits, increased that firm's incentives to operate efficiently, simplified regulation, and made it cost effective.[95] Oftel notes that the operation of the plan has allowed substantial rebalancing of rates within the price cap. This rebalancing apparently refers to increases in rates for local services that, in the United States, are regulated by the states.[96] Even with such rebalancing, however, Oftel observes that the average residential customer has seen a real reduction in telephone bills. Oftel also notes that concerns about service quality in the United Kingdom are attributable to factors other than price cap

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91 British Telecom Comments at 8-14.

92 Id. at 11.

93 Id. at 4-6. British Telecom points out that in addition to Mercury (its major competitor), various telecommunications operators have been licensed to supply a range of services in certain locations. Id at 3.

94 Id. at 13. British Telecom notes that the residential customer is protected from substantial price increases via its limitation on increases in residential exchange line rental charges to RPI + 2. Id. at 6.

95 Oftel Comments at 2-4.

96 Id. at 4.

regulation, such as the effects of a labor strike in 1987 and British Telecom's difficulty keeping pace with sharply rising demand for service.

63. Some commenters caution against adopting the British model in the United States, contending that the telecommunications industries of the two countries are too different,[97] or that the success of the British plan has been exaggerated.[98] A few parties maintain that some characteristics of the British method are germane to rate-of-return regulation, particularly monitoring, and question whether this Commission will retain such procedures.[99] Similarly, Ad Hoc submits that price caps in Great Britain have begun to move from the initial aggregated cap approach toward a more traditional rate-of-return method in response to concerns about British Telecom's earnings.[100]

b. The New York Approach

64. Although the New York DPS concedes that its regulatory approach shares many of the characteristics of price cap regulation, it contends that there are important differences between its "hybrid" plan and the more "pure" price cap plan proposed by this Commission in the Notice. For example, the New York DPS states that this Commission purports to avoid an examination of carriers' cost projections, but that the costs of NYT were projected and public comment was solicited.[101] In addition, the New York DPS notes that the New York plan provides for a 50 percent sharing of any return on equity above 14 percent.[102] Also unlike the mechanism proposed in the Notice, the New York DPS submits, its moratorium uses no generic price level adjustment factors and anticipates a full rate-of-return review at its conclusion.[103] In general, the New York DPS believes that this Commission may have overstated the benefits of price caps and that it should use caution in moving away from

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97 See Comptel Reply at 5; Ad Hoc Comments, ETI Report at 4; Illinois Comments at 18-20; Alabama PSC Comments at 5. See also CP National Comments at 7; Cable & Wireless Comments at 10-11.

98 ALC Comments at 17-20. Contra British Telecom Reply at 1.

99 Maryland PC Reply at 9-10; DC PSC Reply at 10-11.

100 Ad Hoc Reply, ETI Report at 39-40.

101 New York DPS Comments at 9.

102 Id.

103 Id. at 10.

rate-of-return regulation.[104] It asserts that through imposition of certain safeguards, particularly the sharing mechanism, it has increased the lag between earnings improvement and rate reductions designed to capture such improvement, thereby increasing NYT's incentive to operate more efficiently.[105]

65. The few commenters who address the viability of the New York model are generally supportive,[106] and some specifically endorse the sharing mechanism.[107] One commenter states that this Commission's proposed productivity adjustment likely will produce greater downward price pressure than the New York approach.[108] Other parties suggest that this Commission may have misconstrued the New York moratorium and assert that it is predominantly a rate-of-return approach.[109] Moreover, Rochester, a LEC operating in New York State, submits that it has lowered rates under the New York regime and does not anticipate an increase until 1990.[110] It contends that the mechanism encourages it to cut costs and that it protects consumers through decreased rates and prohibition of general rate case filings.[111] Rochester claims, however, that the sharing mechanism weakens carrier incentives to minimize costs as compared to a pure price cap approach.[112]

c. Other Regulatory Approaches

66. In addition to the British and New York models, commenting parties discuss a variety of existing or proposed alternatives to rate-of-return regulation. Many commenters call for immediate deregulation, either partial or total, of services determined to be competitive,[113] or recommend

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104 Id. at 6.

105 Id. at 10-11.

106 See NYNEX Comments at 12; MCI Comments at 21 n.31; NY EnerTel Comments at 23-24; Michigan PSC Comments at 24.

107 E.g., IBM Reply at 9-10.

108 Ad Hoc Comments, ETI Report at 31 n.18.

109 See Networks Reply at 3; Maryland PC Reply at 11.

110 Rochester Comments at 9-10.

111 Id. at 10.

112 Id. at 11.

113 See, e.g., DOJ Reply at 9-14 (this Commission should deregulate most

gradual deregulation preceded by price caps.[114] Other parties advocate some form of banded pricing, whereby this Commission would allow prices to vary above or below a set midpoint by a certain percentage.[115] A few commenters advocate a social contract approach.[116]

67. Other commenters, primarily state commissions, offer favorable comments about approaches adopted or under consideration at the state level. The South Carolina PSC, for example, states that it has applied price caps to AT&T's intrastate, inter-LATA services since 1984, that this approach has been successful, and that AT&T's rates "have decreased below the maximum rates or caps ... and the other interexchange carriers have generally followed suit."[117] The Maryland PC proposes a "capped-over-all rate-of-return ("CORR") coupled with price caps on individual service elements."[118] The Colorado PUC suggests a "Reasonableness of Return" approach built upon a negotiated zone of reasonableness for rates of return.[119] The California PUC outlines its recent investigation into relaxed regulation and advocates an "Observation Approach," characterized by limited carrier pricing flexibility and close regulatory monitoring, as a precurser to a "Prediction Approach,"

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of AT&T's services to the extent possible under the Communications Act, or at least subject those services to the streamlined regulation afforded non-dominant carriers under the Competitive Carrier Orders); Iowa Comments at 2-3 (deregulate competitive markets, otherwise retain rate-of-return regulation).

114 E.g., NTN Reply at 13 (advocates gradual deregulation of AT&T based upon actual experience with competitive pricing via price bands); Illinois Comments at 21-22 (proposes five-year price cap plan to facilitate transition to total deregulation of AT&T). Though DOJ calls for deregulation of most of AT&T's services, it suggests adoption of a temporary price cap system to prevent AT&T's exploitation of market power in its international and 800 Service offerings. DOJ Reply at 20-21.

115 Comptel Reply at 16; ALC Reply at 6 (bands of 3 percent which would increase to 5 percent within two years); NTN Comments at 27-28 (bands of 5 percent which would be expanded by 2.5 percent per year upon a finding that competition is growing and that AT&T has not engaged in predatory pricing); Kentucky PSC Comments at 4-5.

116 NTIA Comments, Attachment at 50-51; NY EnerTel Comments at 17.

117 South Carolina PSC Comments at 1.

118 Maryland PC Comments at 12.

119 Colorado PUC Comments at 6-8.

which entails a finding that dominant carrier market power is greatly attenuated or absent prior to the easing of regulation.[120]

4. Discussion

68. Interested parties who accepted our invitation to discuss alternative regulation generally have commented favorably about the innovative approaches currently administered by regulatory bodies other than this Commission. The comments reflect the rich variety of interests and perspectives of these parties. Those who advocate partial or total deregulation of dominant carriers at the federal level, for example, look with favor on experiments with deregulation in the states. Comments filed by particular state regulatory commissions speak well of the particular form of regulation administered by that commission. Taken as a whole, the comments are instructive in several important respects. First, they demonstrate that in situations in which rate-of-return regulation is applied, there is no single "best" means of doing so. Second, they illustrate that rate-of-return and price cap regulation differ more in degree than in kind. We explore these lessons in more detail below.

69. We begin by stating that while we are impressed by the consensus opinion of interested parties that regulation should be abandoned in the face of workably competitive markets, this Docket was not initiated for the purpose of exploring opportunities to deregulate carriers currently classified as "dominant." Indeed, such carriers are not candidates for deregulation because, by definition, they are assumed to have market power sufficient to permit them to act in manners contrary to the public interest. Rather, we seek in this proceeding to establish regulatory methodologies capable of restraining market power more effectively than rate of return. This is not to say we are indifferent to the substantial record evidence of competition in various telecommunications markets served by either AT&T or the LECs.[121] Indeed, such evidence has informed our judgments about many technical aspects of the price cap plan we are proposing. While we recognize

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120 California PUC Comments, Attachment at 7-11.

121 See discussion at Section II.C.3.a, infra. The record also contains evidence suggesting that state regulators, acting on the existence of competition, are rapidly rescinding regulations governing the provision of service in intra-state, inter-LATA markets. For example, AT&T notes that only 11 states currently apply traditional rate-of-return regulatory constraints to its operations in intrastate, inter-LATA markets. See Letter from G. Morlan, AT&T, to P. Wynns and T. Sugrue, Federal Communications Comm'n (Oct. 27, 1987)(AT&T State Regulatory Reform Summary).

the presence of competition, particularly in the interstate, interexchange market, it is not our intent to consider in this proceeding the question whether AT&T or the LECs remain "dominant" carriers.

70. For present purposes, the more probative record evidence relates to widespread adoption at the state level of regulatory approaches other than traditional "rate base, rate-of-return" methodologies. The sheer number of state commissions experimenting with alternative approaches strikes us as significant evidence of the limitations of rate of return. The technical details of these alternative regulatory approaches differ from state to state. As noted previously, for example, some states administer "banded rate" plans that provide carriers with pricing flexibility, while others have moved to "streamlined" tariffing systems built upon short notice periods and reduced cost support.[122] These differences among the states reflect the particularized judgments of individual state commissions about the most appropriate form of regulation in their jurisdictions. As discussed in Section V, infra, we are drawing upon this experience at the state level in fashioning our price cap proposal. Taken as a whole, moreover, the fact that so many states are moving away from traditional rate-of-return methodologies supports our tentative conclusion that the rate-of-return approach as practiced by this Commission is flawed and that we should develop and implement a carefully structured price caps approach.

71. Certain regulatory alternatives constitute reforms that are more than mere adjustments of the technical details governing the tariff filing process. These alternatives have many different names. Some are referred to as "rate stability plans" or "social contracts." The British call their system "price caps." The New York DPS calls its plan a "rate moratorium." All of these alternatives place limitations on a carrier's freedom to increase rates. All are intended to achieve the same goals -- stabilizing rates, reducing administrative costs, and above all, promoting efficiency and innovation. The New York DPS claims that its "rate moratorium" is significantly different from, and impliedly superior to, the British price cap plan. According to the New York DPS, the source of this difference is the "sharing mechanism" in the New York approach, pursuant to which one half of the carrier's earnings over 14 percent are returned to ratepayers. The British approach also has a built-in "sharing mechanism," however, in the form of the RPI-3 annual adjustment. Although the New York and British approaches appear different, it is not obvious that either of the sharing mechanisms is superior to the other. Each mechanism is but one part of an overall approach, and must be evaluated on that broader basis.

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122 See Office of Policy Analysis and Development, National Telecommunications and Information Administration, U.S. Department of Commerce, Telephone Competition and Deregulation: A Survey of the States (1986); see also AT&T State Regulatory Reform Summary.

72. We begin this evaluation by recalling the statement, supra, that rate-of-return limitations can be characterized as a form of "cost-plus" regulation. We illuminated this characterization by analogy to "cost-plus" contracts in the defense procurement area. The alternative to cost-plus contracting is a "fixed-price" contract. These contracts correspond to ordinary market transactions in which buyer and seller agree on a price that is not subject to renegotiation. Since the seller's profit is the residual between the agreed-upon price and actual subsequent cost, the seller earns profit by reducing costs to the minimum. Any excess costs reduce the firm's profit, or even result in losses, whereas any shortfall of costs from expectations leads to additional profits. Thus, under a fixed-price contract the seller bears all of the "cost risk" associated with production. This assignment of risk clearly maximizes the seller's incentive to reduce production costs.[123]

73. In general, the optimal cost-risk allocation is one that assigns such risk either to the party with better information about the risk or to the party with the lesser aversion to such risk. For example, early defense contracts were primarily cost-plus in the belief that the federal government was in a better position to assume the cost-risk than individual firms who supplied it.[124] This belief stemmed from the fact that the government, as a purchaser of numerous defense goods, could pool the associated cost-risk better than individual suppliers of single goods, and moreover, the government's asset base protected it from the financial chaos that underestimated costs would create for a firm.

74. There is a second consideration that properly affects the choice of contract types. Known in the insurance literature as "moral hazard," this is the likelihood that behavior will be different when the actor is protected from the full adverse consequences of his behavior. The "moral hazard" problem arises under cost-plus contracting because the firm both decides on cost expenditures and is insured against any penalty from excess costs. Its profits remain unchanged, and hence it has little or no incentive to conserve on costs. This issue is not a matter of who bears the costs, but rather what those costs actually are. Under cost-plus, the problem of moral hazard is most severe and costs are most likely to be inflated. By contrast, under fixed-price contracts, the firm has the strongest incentive actually to minimize cost, that incentive being simply the resulting profit it may retain.

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123 See O.Williamson, "The Economics of Defense Contracting: Incentives and Performance," in R. McKean, ed. Issues in Defense Economics 217-78 (1967); see also F.M. Scherer, The Weapons Acquisition Process (1964)

124 Id.

75. The choice, then, between cost-plus and fixed-price contracts depends both on risk-bearing and on moral hazard. The greater the level of risk aversion, by suppliers relative to the government, the more appropriate are cost-plus contracts. But the greater the threat of cost inflation from moral hazard, the better are fixed-price contracts. In reality, neither extreme form is likely to be optimal. Rather, a contract form that shares risks and simultaneously instills incentives to conserve costs is likely to yield desired production at the lowest overall cost to society. Such arrangements are commonly termed "incentive contracts." In general, incentive contracts entail the establishment of a "target" cost. If the target is exceeded by the supplier, its profits decline. On the other hand, cost underruns result in increased profits in accordance with some sharing proportion.

76. The proportion of risk assigned to the firm is a direct measure of the strength of the incentive to conserve on costs. A larger number implies that more of the consequences of the divergence of costs from expectations falls on the firm, as the cost decision-maker. Therefore, a sharing fraction of 100 percent places the entire burden or benefit of cost divergences on the firm, and the contract is essentially fixed-price. Lower values of the sharing proportion absolve the firm from more of these consequences. The extreme case of zero sharing is equivalent to a cost-plus contract. Therefore, the entire range of contract types and their attendant effects on incentives can be summarized in the sharing proportion.

77. Both the British and New York approaches constitute "incentive" regulation. Both approaches address the "moral hazard" problem by shifting more of the "cost risk" to the regulated carrier than occurs under rate-of-return regulation. The New York plan, however, does not appear to shift as much of this risk to the regulated firm as occurs under the British plan. Unlike the British plan, for example, the New York plan does not cover all of the services over which the regulated carrier enjoys monopoly power. Moreover, the British plan does not permit rate adjustments to the price cap other than those resulting from application of the RPI-3 formula, while the New York plan, in addition to permitting rate adjustments to reflect cost changes outside the control of the regulated firm, also permits adjustments for wage, health, and fringe benefit increases, as well as changes in depreciation schedules. And the sharing formula under the New York plan raises the possibility of blunting some carrier incentives for cost reductions and innovations.

78. The record is insufficient to permit a precise estimate and comparison of the efficiency and innovation stimulated by the New York and British plans. Both British Telecom and Oftel, however, represent that efficiency has improved as a result of price cap implementation. By shifting more of the "cost risk" to the regulated carrier, the British plan appears better suited to achieving its primary purpose -- to stimulate efficient and innovative behavior on the part of the regulated carrier. Also, by providing a procedure for adjusting rates on an annual basis in accordance with broadly

based cost measures (i.e., RPI-3), the British plan also seems more likely to achieve the goals of keeping rates in line with costs and, because the adjustments occur on a systematic basis, reducing administrative costs over the long run. By contrast, the New York plan is explicitly a temporary expedient, not intended to replace conventional rate-of-return regulation. The New York plan requires routine monitoring of carrier earnings in order to determine if the sharing formula should come into play. Moreover, the plan postpones the day of reckoning when New York must conduct the exercise that it sought to avoid by adopting a rate moratorium -- a full scale cost-of-service evaluation and rate-of-return prescription for the regulated carrier.

79. It also is not possible to evaluate precisely the comparative consumer benefits achieved by the New York and British plans. The New York plan appears to have achieved nominal rate stability more effectively than the British plan because adjustments for inflation are not permitted under the former. The absence of inflation adjustments, however, implies that the annual price decrease in real terms for consumers in New York is unpredictable, since it depends on actual inflation rates. Given nominal price stability, the real price decrease can be approximated today by adding up the annual inflation rates during the period in which the New York plan was implemented initially, from 1986 through 1987. Measured by the Consumer Price Index, this figure was 6.3 percent, or about 3.1 percent per year.[125] Since the regulated firm's earnings were below 14 percent during this period, the "sharing mechanism" did not come into play,[126] and so the annual 3.1 percent figure represents the entirety of consumer benefit under the New York plan.

80. By comparison, during the slightly longer period of price cap implementation in the United Kingdom, British Telecom observes that the inflation rate (i.e., Retail Price Index) rose by 20.1 percent and the weighted price of services covered by price caps increased only 5.5 percent. This represents a total 14.6 percent decrease in real terms for those services, or 4.6 percent per year over the period. Of course, these figures are not exactly comparable, and they permit only a rough measurement of the relative consumer benefits achieved under the New York and British plans.

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125 See Survey of Current Business, Bureau of Labor Statistics, U.S. Department of Commerce, for the years 1986-87.

126 According to the New York DPS, NYT earned 13.2 percent on equity during 1985 and 12.6 percent in 1986. See New York Telephone Co., Case 28691, Opinion No. 85-17 (D) (N.Y.P.S.C. May 11, 1987) at 23 n.1. The record in this proceeding contains no calculation of NYT's earnings during 1987. The New York Public Service Commission order extending the moratorium through 1991 contains an estimated 1988 earnings calculation of 12.2 to 12.4 percent. Id. at 24.

However, these figures represent perhaps the best comparison of consumer benefit under the two plans.

81. Both the New York and British plans represent innovative attempts to offset the limitations of traditional rate-of-return regulation. Consumers benefit under both approaches. The British plan appears better designed from the standpoint of encouraging efficiency and innovation. It also seems better suited as a model for regulation on an on-going basis because the RPI-3 formula regularly and systematically adjusts rates to reflect underlying cost changes. The New York plan, by contrast, provides greater assurances of rate stability in the event of high inflation and no doubt has reduced the cost of administering regulation in New York State, as well as established some incentives for carrier efficiency. The choice between the two approaches depends on what policy goals are thought to warrant emphasis.

C. The Price Cap Proposal

1. Summary of Notice

82. In the Notice, we discussed the advantages and disadvantages of price cap regulation. With regard to the former, we noted that this approach would encourage greater efficiency and innovation than rate-of-return regulation, especially in less competitive markets, because carriers subject to price caps would be permitted to retain some of the profits arising from increased efficiency or creativity. This approach also would substantially decrease incentives to shift costs from more to less competitive services, and would reduce, if not eliminate, incentives to inflate the rate base. Price caps also appear to offer ratepayers greater protection against sudden, steep rate increases, and could prove simpler and less costly to administer than rate-of-return regulation.[127]

83. We noted as well that, in its purest form, the price cap model could have some potential weaknesses. If a carrier's production costs fall substantially more sharply than the productivity factor in the formula used to adjust the price cap ceiling, for example, a carrier conceivably could earn unreasonable profits. At the other extreme, the formula might be designed so tightly as to violate constitutional and statutory prohibitions against confiscatory rates. We also raised the question of whether price caps might adversely affect service quality or technological innovation necessary to achieve a feature-rich network, especially for small businesses and residential users. We tentatively concluded that these possible flaws could be addressed without fatally undermining the advantages that price caps appear to possess. We sought comment on our discussion and tentative conclusions, particularly with regard to: (1) the likelihood that enhanced carrier efficiency or innovation will result from the possibility of the carrier's retaining some portion of the incremental revenues resulting from these factors; and (2) the likelihood that projected increases in carrier efficiency or innovation resulting from the possibility of higher earnings would lead to lower prices for consumers.[128]

2. Pleadings

a. In General

84. AT&T, all of the BOCs and major independents, and some OCCs, large users, enhanced service providers, and states generally conclude that

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127 Notice, 2 FCC Rcd at 5213-14 (paras. 33-34).

128 Id. at 5214 (para. 35).

the advantages of price caps outweigh the disadvantages.[129] Many of these commenters maintain that increased efficiency[130] and rate stability[131] are inherent in the price cap approach. Many commenters which favor the price cap approach but emphasize the need for careful implementation,[132] while others are non-committal.[133]

85. On the other hand, some commenters assert that the disadvantages of price caps outweigh the advantages or that, at best, this Commission's proposal is premature. For example, ALC asserts that this Commission has provided no evidence that carriers will reduce their rates under price cap regulation, or that this form of regulation will be less burdensome or less complex than rate-of-return.[134] Some states express the concern that the expected benefits of price caps may not materialize unless the states institute similar plans, which may not be possible because some state statutes establish specific rate-of-return regulatory requirements.[135] Moreover, the National Association of Regulatory Utility Commissioners contends that this Commission should proceed with caution and restraint in implementing price cap regulation, so as to ensure that this

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129 E.g., Ameritech Comments at 6; BellSouth Comments at 2; GTOC Comments at 6; USTA Comments at 11; MCI Comments at 2-3; EDS Comments at 9-10; OPASTCO Comments at 1-2; Ad Hoc Reply at 1-3; Michigan PSC Comments at 7. AT&T and Rochester both advocate regulatory forbearance and streamlined tariff filing requirements, but they concede that price caps are superior to the existing system. AT&T Comments at iii, 29-33; Rochester Comments at 2-3.

130 BellSouth Comments, App. A at 20-21 (testimony of Kahn and Shew); NYNEX Comments at 16; Ameritech Comments at 11-12; United Airlines Comments at 1-2.

131 NYNEX Comments at 16; SWB Comments at 20-21; US West Comments at 13-19. EDS submits that price caps will offer greater certainty and improved long-term planning, since they will be based on verifiable changes rather than economic projections. EDS Comments at 9-10.

132 See, e.g., BellSouth Reply at 3; Locate Comments at 1-2; West Virginia Comments at 4.

133 E.g., GECS Reply at 3-4 (GECS is unconvinced of the potential benefits of price caps, especially for services with no competitive alternatives, and cautions that such benefits will only be realized if the price cap plan is properly carried out).

134 ALC Comments at 28-30; accord NASUCA Comments at 16; Iowa Comments at 8.

135 See, e.g., Arizona Comments at 6-9.

proposed change in interstate regulation has no effect on jurisdictional allocations, intrastate rates, or intrastate services.[136]

b. Service Quality; Universal Service; Technological Innovation; Efficiency

86. Commenters generally agree that price cap regulation will encourage economically efficient behavior on the part of dominant carriers. For example, AT&T contends that the elimination of rate-of-return regulation and the adoption of price caps will stimulate it to expand cost cutting technological innovation, while the presence of interexchange competitors will ensure that it continues to offer high quality service.[137] AT&T's consultants note that price cap regulation will effectively deal for the first time with the regulatory dilemma that precluding profits attributable to the exercise of market power also denies any legitimate return due to superior performance in terms of efficiency, innovation, and productivity growth.[138]

87. Similarly, most LECs contend that price cap regulation should encourage efficiency and technological innovation in the local exchange access markets without endangering service quality or universal service, so long as cap levels are not unduly restrictive and some form of quality monitoring is maintained.[139] Most LECs, in fact, assert that service quality should improve under a properly designed price cap regime,[140] although some make the

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136 NARUC Reply at 4-5.

137 AT&T Comments at 62.

138 Id., App. C at 9-10 (testimony of Baumol and Willig). Baumol and Willig contend that because there is no practical way of dividing earnings that exceed the firm's cost of capital between gains due to monopoly power and those resulting from superior performance, regulators have been forced to rule out all earnings, whatever their source, above some minimum "fair" return. Id.

139 See, e.g., Ameritech Comments at 9-11; Bell Atlantic Comments at 5, 13-14; Bell Atlantic Reply at 15-16; BellSouth Comments at 16-17; BellSouth Reply at 8; NYNEX Comments at 16-19; NYNEX Reply at 18-20; Pactel Comments at 30-32; SWB Comments at 17-18; SWB Reply at 25; GTOC Comments at 38; GTOC Reply at ii, 2; SNET Comments at 5 & n.7; United Comments at 14; Centel Comments at 19; Centel Reply at 4, 18-19; USTA Comments at 13; USTA Reply at 12; PRTC Reply at 5; but see OPASTCO Comments at 4-5 (price cap approach may be inconsistent with the maintenance of Universal Service Fund); CP National Comments at 5 (price caps may lead to service degradation).

140 E.g., Bell Atlantic Reply at 15; BellSouth Reply at 8; United Comments at 14.

argument that price caps could increase economic efficiency by enabling carriers to respond to differing consumer demands for quality with quality-price differentials.[141]

88. LECs argue that many technological innovations themselves reduce costs and would thus improve long term earnings levels under a price cap approach.[142] They also note that the opportunity to receive a higher return on investment under price caps will encourage investment in new technologies that would not be worth the risk under the earnings ceilings imposed by traditional regulation.[143] Several LECs stress that their long term interests in attracting customers onto the network and in maintaining its viability should override any incentives to improve short term profits by degrading service quality.[144] Many LECs maintain that the competitive pressure imposed by the threat of bypass will spur facilities and product innovation and ensure that service quality is maintained or improved.[145]

89. Many other commenters assert or imply that the existence of competition is an important factor in determining whether price cap regulation would tend to undermine innovation and service quality. Thus, several parties contend that price cap regulation of AT&T would not raise serious risks of service degradation, since the profit motive and competitive pressures would encourage that carrier to offer new and innovative services and pricing

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141 GTOC Reply at 10 n.10; BellSouth Comments, App. A at 16 (testimony of Kahn and Shew). Kahn and Shew add that "one virtue of this shift in method of regulation could be that it would expose the issue of optimal service quality and variety to explicit regulatory attention," since under price caps there would be a "direct confrontation between benefits and costs." Id.

142 Ameritech Comments at 9-10; SWB Comments at 16-17. See generally NYNEX Comments at 16-20. One LEC's consultants contend that because price cap regulation divorces a carrier's earnings from the size of its rate base, it could eliminate the "theoretical" possibility that a carrier would avoid cost-reducing investment because its existing assets have not been fully depreciated and the obsolescence of such assets would remove them from the rate base. BellSouth Comments, App. A at 14 (testimony of Kahn and Shew).

143 NYNEX Reply at 20-21; SWB Comments at 18; Bell Atlantic Comments at 13-14; Ameritech Comments at 10; BellSouth Comments at 17.

144 Ameritech Comments at 9; GTOC Reply at 10; USTA Comments at 13.

145 Bell Atlantic Comments at 5; NYNEX Comments at 17; SWB Reply at 25; Centel Reply at 18-19.

alternatives.[146] On the other hand, numerous commenters -- including several that are not opposed to the price cap approach in principle -- warn that price cap regulation of the LECs, which face less competition than AT&T, could pose such risks in the absence of strict regulatory oversight.[147] One commenter contends that, even under rate-of-return regulation, with its alleged tendency to encourage rate base padding, LECs have been slow to install new digital technology. It fears that this pattern would become worse under the cost cutting pressures created by price caps.[148]

90. Most commenters fearing service degradation maintain that carriers, particularly the LECs, may reduce investment, reduce or discontinue maintenance, lay off personnel, and, ultimately, allow deterioration of physical plant in order to reduce costs and increase profits.[149] Some specifically refer to the experience of the commercial airline industry in the years since deregulation, which, they assert, has been plagued with service quality problems and "thin route" abandonments.[150] In addition to expressions of general concern regarding the viability of the network, some commenters warn that the burdens of service deterioration may fall hardest on residential and small business users, who have the fewest service alternatives available to them.[151] One commenter argues that if some, but not all, services are capped, carriers could manipulate the demand of captive

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146 MCI Comments at 17; Delta Comments at 1; EDS Comments at 9-10; Ad Hoc Reply at 1; Illinois Comments at 12. DOJ asserts that temporary price cap regulation of AT&T, limited to its least competitive services, would not create significant risks of service degradation over the short term. DOJ Reply at 28-30. CCTU argues that technological advances by AT&T under price cap regulation may actually undermine competition in the interexchange market. CCTU Reply at 11-12.

147 E.g., TCA Reply at 20; MCI Reply at 51-54; DOJ Reply at 28, 48. Cf. NTIA Comments at 64-65 (general discussion regarding potential incentives of regulated firms to allow service quality to decline under price cap regulation).

148 NTN Reply at 18-19.

149 CP National Comments at 8-12; NTN Reply at 15; CCTU Comments at 8-12; IDCMA Comments at 10-11; NASUCA Comments at 17-18; Ohio OCC Reply at 8; Maryland PC Comments at 18; Missouri PSC Comments at 4; DC PSC Reply at 4; New Hampshire PUC Comments at 5-6; Arkansas PSC Comments at 4; Hawaii Comments at 8-9.

150 CCTU Comments at 13-14; Missouri PSC Comments at 4.

151 E.g., NASUCA Comments at 17-18.

users through selective variations in service quality, thereby causing customer migration to services of the carriers' choosing.[152] Finally, two commenters raise the possibility that price cap regulation may undermine service quality and carrier financial integrity by encouraging reckless -- rather that reduced -- investment, since such a regime theoretically permits unlimited returns on successful investments, while the Constitution's protections against confiscation reduce the risks associated with failure.[153]

c. Sharing Benefits with Ratepayers

91. AT&T states that ratepayers will benefit from price cap regulation, both through the availability of new products and services and through lower prices that will result from its increased freedom to respond to competition.[154] The LECs also assert that ratepayers will benefit from a price cap regime. Virtually all LECs contend that ratepayers will see a variety of new and innovative services under a price cap approach.[155] Most predict at least long term price decreases as a result of cost cutting, technological innovation, and the productivity offsets built into the price cap mechanism.[156] One carrier sees added opportunities for consumers to utilize information technologies and services as another beneficial by-product of price cap regulation, since carriers would be encouraged to make necessary technological improvements to the public switched network.[157]

92. Commenting customers and states generally agree that the lack of competition in the local exchange access markets would allow LECs to retain cost savings for themselves under price cap regulation in the absence of an explicit and effective regulatory mechanism to force them to share their gains with ratepayers.[158] These same groups appear more divided on the implications of price cap regulation of AT&T. One large user maintains that, after an initial period of increased profits for AT&T and its competitors,

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152 IDCMA Comments at 11 n.15.

153 Ad Hoc Reply, ETI Report at 12; DC PSC Reply at 9.

154 AT&T Comments at 45.

155 E.g., NYNEX Comments at 18-19; SWB Reply at 20, 23; BellSouth Reply at 11; GTOC Comments at 18, 26; USTA Comments at 12-13.

156 US West Reply at 11; GTOC Comments at 18, 26; USTA Reply at 3; United Comments at 14.

157 NYNEX Comments at 18-19.

158 E.g., ANPA Reply at 8; Maryland PC Comments at 6-7.

prices for interexchange services would fall under price cap regulation.[159] A few states express concern that AT&T's rates would be higher under a price cap approach than under rate-of-return regulation. New York DPS, for example, provides evidence purporting to demonstrate that AT&T's revenue per minute during the period from 1973 through mid-1987 was significantly lower than the revenue per minute that would have resulted if the price cap approach (using either a CPI or a "CPI minus 3" adjustment formula) had been in effect during this period.[160]

d. Potential for Excessive Profits

93. AT&T, the BOCs, some independent telephone companies, and some other parties do not believe that excessive profits are likely under price cap regulation. They assert that profits will be held in check by market forces as well as regulatory oversight.[161] Some large users, consumer groups, states, and other parties, however, predict that price caps will permit carriers to retain excessive profits, especially in light of AT&T's continued market power. These commenters contend that the problem will be exacerbated if initial caps are set at current rates or if they are set above cost.[162] Other parties suggest that appropriate safeguards could reduce the threat of unwarranted profits,[163] or concede the problem but assert that windfall

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159 EDS Comments at 9-11. EDS adds that price cap regulation would give AT&T the flexibility to offer standard volume and usage sensitive discounts: Id.

160 But see AT&T Reply at 30-32 (New York DPS hypothetical calculations are based on erroneous assumptions of how AT&T's plan would work; for example, they assume that the CPI adjustment would apply to all of AT&T's costs, whereas, in fact, such an adjustment would apply only to non-access cost elements -- and access cost reductions would be flowed through separately).

161 See, e.g., AT&T Reply at 10; BellSouth Comments at 16; NYNEX Reply at 24; NYNEX Comments, App. B at 13 (testimony of Levin); USTA Comments at 13; Ameritech Reply at 25-28; GTOC Comments at 12. DOJ's Comments reflect its belief that this Commission should not closely monitor earnings, lest the benefits of price cap regulation be lost. See DOJ Reply at 26.

162 IBM Comments at 9; CCTU Reply at 21; NASUCA Comments at 17; Missouri PSC Comments at 2; Colorado PUC Comments at 13; Florida PSC Comments at 12-13; Iowa Comments at 7; New Hampshire PUC Comments at 4; DC OPC Reply at 6. Other commenters argue that it may be difficult to determine excess earnings without rate-of-return regulation. Maryland PC Reply at 12; Pennsylvania Reply at 3-4.

163 See, e.g., TCA Comments at 13-14; West Virginia Comments at 4-5.

profits and losses are a natural consequence of the competitive marketplace and that such profits are not sustainable over time.[164]

e. Confiscatory Rates

94. None of the commenting parties asserts that unconstitutional confiscation of property is likely to be a significant risk under price cap regulation. Dominant carriers generally give little attention to the issue other than to state that a price cap regime should contain safety valves to protect against confiscation in the unlikely event that prices are forced below costs. USTA, for example, asserts that carriers should retain the right to file above-cap tariffs, subject to full scrutiny.[165] Centel would create an exemption from the otherwise mandatory application of price caps to non-pooling LECs in cases of unique hardship.[166] BellSouth asserts that the problem of confiscation can be addressed at the time of periodic review, or sooner, upon a carrier's petition.[167]

95. Other commenters, predominantly states and user groups, see the constitutional protections against confiscation and the carrier flexibility associated with price caps as creating the danger that price cap regulation would apply asymmetrically to the carriers' benefit.[168] They argue that the Constitution will provide absolute lower limits on price cap levels, while the absence of available cost data may make it difficult to enforce even non-confiscatory downward adjustments to price caps in the face of carrier arguments that such adjustments would be constitutionally suspect.[169] On the other hand, they contend, price cap regulation would impose no secure earnings ceilings upon carriers. ALC characterizes this allegedly asymmetrical nature of price cap regulation as "deregulation below the line and business as usual above it."[170]

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164 Illinois Comments at 24-25.

165 USTA Reply at 10 n.17.

166 Centel Reply at 15.

167 BellSouth Comments at 16.

168 See, e.g., Iowa Comments at 7 & n.13; CCTU Comments at 10.

169 See, e.g., Iowa Comments at 7 & n.13.

170 ALC Comments at 21-22.

Competition

96. Many commenters raise concerns regarding the effect of competition on the viability of price cap regulation. Some maintain that the degree of competition is an important factor to be considered in designing a functional price cap scheme.[171] Others assert or imply that competition is an absolute prerequisite to the establishment of a viable price cap plan.[172] Several parties express the view that, absent competition, the move away from intrusive rate-of-return regulation toward a more "light handed" price cap approach will give dominant carriers increased freedom to engage in a host of anticompetitive or exploitative activities. In particular, they assert that the relaxed regulatory oversight and the attenuated relationship between costs and rates under a price cap scheme may allow strategic or predatory pricing,[173] cross-subsidies between regulated and competitive services,[174] rate churn,[175] and retention of monopoly profits.[176] While some contend that these risks can be averted through adoption of various safeguards within the new regulatory format,[177] others claim that such an effort would be impossible[178] or so administratively burdensome as to be impractical.[179]

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171 AT&T Reply at 4; MCI Reply at 6; US Sprint Reply at 4; Ad Hoc Reply at 19-20 & n.11; id., ETI Report at 5; DOJ Reply at i, 2.

172 NTN Reply at i, 2; Rollins Reply at 1-2; NASUCA Reply at 9-13.

173 E.g., NTN Reply at 15; Ad Hoc Reply at 19-20; ANPA Reply at 3; NASUCA Reply at 9.

174 E.g., Ad Hoc Reply at 19-20; ANPA Reply at 5-6; IDCMA Reply at 29-31; Alarm Industry Reply at 5-6; Ohio OCC Reply at 10; Pennsylvania Reply at 3; Hawaii Reply at 22; Maryland PC Reply at 17.

175 E.g., Ad Hoc Reply at 19-20.

176 E.g., DC PSC Reply at 3.

177 E.g., MCI Reply at ii, 6; Ad Hoc Reply at 19-22.

178 See, e.g., NTN Reply at 12 (floors and ceilings cannot be set accurately).

179 See, e.g., NASUCA Reply at 9 (administrative costs would be as high as those of rate-of-return regulation and social costs could be substantially higher); Maryland PC Reply at 15 (price cap approach cannot alleviate administrative burdens associated with rate-of-return regulation without "a degree of abdication of regulatory responsibility that the Commission has denied it intends and that would invite both judicial and congressional

97. Other commenters, led by the LECs, suggest that competition is not a condition precedent to the implementation of effective price cap regulation, since, like rate-of-return regulation, price caps serve as a proxy for competition.[180] Consultants for one LEC observe that the greatest weakness of rate-of-return regulation is its failure to exert the "dynamic pressures" that competition exerts upon companies to be efficient.[181] On the other hand, it asserts, "where competition is present, it can mitigate the deficiencies of traditional regulation."[182] Thus, it claims, the weakness of rate-of-return regulation "is more consequential -- and therefore the gains from moving to rate-cap regulation are likely to be correspondingly greater -- precisely where competition is least in evidence."[183]

98. Supporters of price cap regulation also dispute claims that this approach would encourage cross-subsidization or rate churn in the absence of competition. Pactel, for example, asserts that since prices are not based upon an allocated cost of service under price cap regulation, any misallocation of service costs among interstate services would be irrational and irrelevant.[184] USTA contends that price caps will enhance rate stability and consumer welfare because customers will know that overall prices will not exceed a specific level without a full rate-of-return tariff filing, while NYNEX argues that rate churn is less likely under the price cap approach because it discourages the kind of arbitrary cost shifts that could produce frequent rate fluctuations.[185]

99. AT&T argues that competition will play an important role in protecting customers under price cap regulation,[186] and it asserts that

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challenge.").

180 E.g., Bell Atlantic Reply at 12; Centel Reply at 13-14.

181 BellSouth Reply, App. A at 3 (testimony of Kahn and Shew).

182 Id.

183 Id.

184 Pactel Reply at 18. Accord SWB Reply at 18. Cf. DOJ Reply at 3 (opposes immediate price cap regulation of LECs for other reasons, but notes that a price cap "cannot be evaded by reallocating accounting costs from unregulated competitive services to regulated monopoly services" and thus "is especially appropriate in a partial deregulation situation ....").

185 See USTA Reply at 10; NYNEX Reply at 22-23.

186 AT&T Reply at 4. AT&T asserts that "[a]t best, properly-designed caps

the interexchange market is competitive.[187] It maintains that evidence regarding economies of scale demonstrates that the interexchange market is not a natural monopoly, and adds that since network costs are a small part of an interexchange carrier's total costs, even significant scale economies would not confer appreciable cost advantages on larger carriers.[188] Several other commenters essentially agree that the interexchange market, or most of it, is now competitive,[189] pointing to, among other things, the large number of carriers providing interstate MTS services and the existence of industry-wide excess network transmission capacity.[190]

100. Other commenters, while conceding that the interexchange market has become more competitive in recent years, assert that AT&T retains significant market power in the provision of interexchange services.[191] These commenters point to the fact that, despite the transition to equal access, including balloting mandated by this Commission, AT&T has maintained a dominant share of the interexchange market.[192] They argue that, notwithstanding the increasing number of resellers and facilities-based ICs, substantial entry barriers remain in the interexchange market,[193] and they

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would be ... superfluous 'safety nets.'" AT&T Comments at ii. Thus, it argues that a price cap plan should avoid cumbersome procedures that interfere unduly with market operations. AT&T Reply at 4.

187 AT&T Reply at 11.

188 Id.

189 GTOC Reply, Attachment A at 1-6; Rochester Comments at iii, 1-2; Illinois Comments at 21; DOJ Reply at i, 2, 9-11; NTIA Comments at 55.

190 NTIA Comments at 54-57.

191 NTN Reply at 6-7; Rollins Reply at 1; NASUCA Reply at 10; Pennsylvania Reply at 3.

192 CFA and NASUCA claim that AT&T maintains approximately a 75 percent share of the interexchange market. CFA Comments at 38-49; NASUCA Reply at 12-13. NTN rebuts assertions that past regulatory policies account for AT&T's continued market share dominance, noting that private line competition has been permitted for many years, but AT&T still provides over 90 percent of interexchange private lines. NTN Reply at 8. AARP contends that interexchange competition is weakest in the provision of services to residential consumers. AARP Comments at 3.

193 NTN Reply at i, 6; CFA Comments at 49-51. NTN contends that AT&T continues to hold advantages in customer relations, good will, experience,

stress that AT&T's current competitors have not been profitable of late.[194] One commenter observes that although AT&T has presented some evidence of interexchange competition, the concerns expressed by AT&T's customers should give this Commission reason to be skeptical, since "buyer perceptions ultimately define the 'marketplace.'"[195]

101. While the comments evince considerable disagreement regarding the competitive status of the interexchange market, greater concensus exists concerning the status of competition in the market for interstate access services provided by the LECs. With the exception of some LECs,[196] commenting parties uniformly assert that the local exchange markets are not currently competitive.[197] In addition, some commenters contend that LEC protestations regarding the threat of bypass are, at best, unsubstantiated.[198]

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and scale economies. NTN Reply at 6. CFA argues that in order to compete successfully, new entrants must offer a wide range of services over a wide geographic area. CFA Comments at 49-51. It asserts, however, that most ICs do not and cannot offer such wide ranging services, noting that AT&T maintains its highest market share in markets with low density and high costs. Id. at 39, 42.

194 CFA Comments at 39-49; NASUCA Comments at 13-15.

195 Ad Hoc Reply, ETI Report at 38. See also CFA Comments at 39-49 (AT&T competitors suffer from actual and perceived quality disadvantages).

196 The GTOCs claim that "[e]xchange carriers are now subject to competition for a number of interstate access services," and would be subject to bypass if not included in price cap regulation. GTOC Reply at 6. USTA contends that a growing number of firms are providing facilities that are substitutes for LEC services, particularly special access services. USTA Reply at 16.

197 E.g., MCI Reply at 4; ALC Reply at 29; USTS Reply at 4; NTN Reply at 15; CFA Comments at 58; NASUCA Reply at 28.

198 Ad Hoc Reply at 9 (bypass has been insignificant to date); id., ETI Report at 35-36 ("[W]hile 'bypass' is growing in absolute terms, the demand for LEC services is growing even faster, both on an absolute and on a relative basis, such that persistence of the LECs' current position of market dominance into the forseeable future is assured."); ADAPSO Reply at 10 (bypass market is not extensive enough to act as a competitive deterrent for the LECs to engage in anticompetitive activity).

3. Discussion

102. In the Notice, we observed that the primary advantages of the price cap approach vis-a-vis rate-of-return regulation are: the promotion of service efficiency and technological innovation; the reduction, if not elimination, of incentives to engage in harmful cross-subsidization; and administrative simplicity.[199] We also suggested that, unlike rate of return, the price cap approach does not distort the competitive process in situations in which competition exists. We tentatively concluded that these advantages, when viewed as a whole, would offer ratepayers greater protection and further the public interest more effectively than rate of return. Those who take issue with our analysis and conclusions tend to fall into three categories. The first group contends that our discussion of the advantages of price caps in the Notice is not sufficiently detailed and, thus, does not provide adequate justification for adopting this alternative regulatory approach. The second group asserts that price cap regulation creates its own set of disadvantages, and these are great enough to warrant the continuation of rate of return. The third group alleges that the price cap approach is inherently "light handed" regulation which cannot be effective in the absence of strong competitive forces. We address each of these concerns in turn.

a. Advantages of Price Caps

i. Cost incentives

103. The foremost advantage of price cap regulation is that it creates clear incentives for the regulated firm to produce its services efficiently. This incentive effect results from the carrier's recognition that every dollar it saves through cost-cutting will not automatically be recaptured by the regulator, as it is, in principle, under rate-of-return regulation. The prospect of the carrier's retaining the benefits of its own efficiency-enhancing activities can be expected to result in lower overall costs under price caps.[200] Thus, prices to consumers need not be higher for

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199 Notice, 2 FCC Rcd at 5213-14 (para. 33).

200 Although it is impossible to quantify in advance the magnitude of cost reductions obtainable under price caps, our previous discussion of the inefficiencies generated under "cost-plus" rate-of-return regulation suggests that these reductions would be significant. See discussion in Section II.A.3, supra. Moreover, a recent study indicates that AT&T Message Telecommunications Service rates (i.e., day, evening, and night/weekend) are on average between 7 and 10 percent lower in states that have adopted a price cap approach than in states that continue to use rate-of-return regulation. See A. Mathios & R. Rogers, "The Impact of Alternative Forms of State Regulation of AT&T on Direct Dial Long Distance Telephone Rates," Federal Trade Commission, Bureau of Economics, Working Paper Series No. 159 (Dec.

the firm to earn greater profits, since higher profits may be obtained entirely from cost savings induced by price caps. Even if consumers were no worse off than before, an increase in profits represents a true gain to the economy, since the same output is now being produced at less cost. Moreover, as we discuss more fully below, the price cap plan we are proposing also is designed to make consumers better off by forcing carriers to share with consumers a portion of the benefits obtained through efficiency gains.

104. Moreover, price caps do not create the two previously discussed undesirable incentives to operate inefficiently that are established by rate of return, namely the "Averch-Johnson" effect and "X-inefficiency."[201] The Averch-Johnson effect is entirely the result of the profit-maximizing firm's effort to evade the constraint of rate-of-return regulation. Absent rate-of-return regulation, the incentive to undertake such evasive action disappears. Under price caps, profits flow directly from cost savings, not (as under rate-of-return regulation) the size of a carrier's rate base. Thus, a carrier will have a reduced incentive to employ excessively capital-intensive techniques of production. Indeed, if it did so, it would necessarily incur above-minimum costs of production and, consequently, earn below-maximum profits. Because incurring economically unnecessary expenses also would result in below-maximum profits, the X-inefficiencies resulting from rate-of-return regulation also would be reduced under price cap regulation.

105. Some commenters, including NARUC, argue that the improved cost efficiency incentives created by price caps could also be achieved under rate-of-return regulation by taking advantage of a phenomenon commonly known as "regulatory lag."[202] This refers to the lapse of time between the moment when a carrier's earnings begin to exceed its authorized return, and the moment when the regulatory agency recognizes this discrepancy and implements appropriate adjustments to the carrier's rates. The problem with this argument is threefold. First, although it is true that "regulatory lag" helps establish incentives for efficiency, such incentives are likely to be quite weak. After all, the bulk of the regulatory apparatus associated with rate-of-return regulation is intended to ensure that "regulatory lag" does not occur. Indeed, it exists only as a result of friction in the system, speficically, the practical difficulties of enforcing rate-of-return regulation. Even if this apparatus were held in abeyance for a predetermined period, the regulated firm would understand the temporary nature of such

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1987).

201 The Averch-Johnson effect and X-inefficiencies are discussed in Section II.A.3, supra.

202 See NARUC Reply, Attachment at 3.

action. And the carrier's recognition that such apparatus would be brought to bear at some point to recapture the benefits of its efficiency efforts likely would dampen its incentive to undertake such efforts in the first place.

106. Second, establishing an authorized rate of return is the sine qua non of rate-of-return regulation. It is a determination by a regulatory agency that the authorized return is just and reasonable. In the broadest sense, therefore, a "rate-of-return" policy that consciously relies on regulatory lag to further the public interest is a policy at war with itself. Third, although a policy relying on "regulatory lag" may represent an improvement over the current system in terms of promoting efficiency incentives, it would not be superior to our price cap proposal from a consumer standpoint. The price cap adjustment we are proposing guarantees consumers an up-front share in the efficiencies stimulated by this approach to regulation, while the regulatory lag effect in itself provides consumers no share of efficiency improvements.

ii. Innovation

107. Innovation and technological change are the driving forces behind improvements in a society's standard of living.[203] Superior products and production processes are not the result of happenstance, however. They result instead from the expenditure of effort and resources by individuals or companies. Absent some prospect of recovering those expenditures -- and more -- few inventors would be inclined or able to pursue innovations. The result over the long term would be fewer innovations, a slower rate of technological change, and slower improvements in the standard of living for society as a whole.

108. Promoting innovation through the establishment of profit-based incentives has been a recognized public policy in the United States since the founding of the Republic. The Constitution itself states that "To promote the Progress of Science and useful Arts" Congress might provide "for limited Times to ... Inventors the exclusive Right to their ... Discoveries."[204] This provision, which established the foundation for the award of patents, is designed to promote innovation by establishing an incentive system that assures successful innovators an opportunity to earn returns commensurate with their efforts.

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203 Evidence supporting this proposition is reviewed in F.M. Scherer, Industrial Market Structure and Economic Performance (1980).

204 U.S. Const. art. I, § 8, cl. 8.

109. As noted previously, the incentive structure established under rate-of-return regulation appears hostile or, at best, passive, toward the two primary kinds of innovation. If a carrier attempts to "do the same old thing a better way" -- for example, by producing the same service at lower cost -- rate-of-return regulation denies the carrier any future benefit from such effort by forcing a rate reduction, and it may attempt to recapture already realized benefit by awarding refunds to consumers. Such regulation also may offer carriers little incentive to bring new services to the marketplace because the costs of unsuccessful innovation are borne by shareholders, while the benefits of successful innovation are precluded to the extent they exceed the carrier's authorized return. Of course, this treatment of innovation under rate-of-return regulation dampens carriers' incentives to innovate, a result that is inconsistent with the public interest.[205]

110. Price cap regulation, on the other hand, affirmatively encourages innovation by offering carriers the opportunity to retain some of the rewards of successful innovation. Under the price cap system proposed in this Further Notice, carriers instituting innovative production processes that lower costs beyond the level required by the price cap formula would be permitted to retain the bulk of additional profits resulting from such innovations, at least in the short run. Moreover, carriers would be permitted to offer new services outside of cap constraints for a brief period, whereupon the service would be brought under the cap regime and its price would be made subject to cap constraints, including limitations on annual price changes. We tentatively conclude that this proposed treatment of carrier innovations strikes a better balance between the goal of ratepayer protection and the public interest benefits of innovation than is achieved under rate-of-return regulation.

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205 It does not follow from this discussion, nor do we contend, that carriers subject to rate-of-return regulation have no incentive to innovate. As noted previously, regulatory lag establishes some, albeit weak, incentive to innovate. Moreover, the Averch-Johnson phenomenon may also have secondary effects that promote innovation; specifically, by encouraging expansion of the rate base, the Averch-Johnson effect may coincidentally encourage some innovation. Experience has demonstrated that such innovation often consists of imprudent attempts at commercializing the fruits of basic research, with AT&T's Picturephone experience during the 1970s being but one example. See "The New Look at America's Top Lab," Fortune, Feb. 1, 1988, at 58. It is altogether unlikely that all these factors would provide the same incentives for economically optimal innovation as occur under price cap regulation. Therefore, price caps represent a superior alternative to rate-of-return regulation by virtue of eliminating all the (possibly conflicting) forces distorting the firm's decisions concerning whether, when, and how to undertake innovative action, which increases the likelihood that innovation will be more market driven and, hence, more consumer-oriented.

iii. Cross subsidization and pricing efficiency

111. The price cap approach to regulation also represents an improvement over rate-of-return regulation with regard to preventing cross-subsidization and improving the efficiency of a dominant carrier's rate structure. Price cap regulation curtails cross-subsidization by reducing the economic incentive to engage in such conduct. This form of regulation also encourages efficient pricing by providing regulated carriers a measure of flexibility to adjust their rates to conform with prevailing market demand.

112. As noted previously, carriers subject to rate-of-return constraints have a regulatory incentive to manipulate their reported cost allocations, assigning the greatest amount of costs to their least competitive services and thereby cross-subsidizing their most competitive services. This can be a profitable strategy under rate of return because it increases the carrier's total dollar earnings. Under price cap regulation, however, cost shifting is not a profit-enhancing strategy because the cap restraint on price increases limits a carrier's flexibility to raise rates to accommodate the shifted costs, which suggests that such activity is not likely to occur.

113. In addition to the beneficial result of reducing harmful cross-subsidization, price cap regulation also would represent an improvement over rate of return in terms of promoting pricing efficiencies that benefit consumers as a whole. Economics teaches that the "best" means of maximizing economic efficiency is to price in accordance with marginal costs, but this Commission is well aware of the considerable practical difficulties of pricing regulated telecommunications services in this manner.[206] Foremost among these difficulties is the likelihood that pricing every service at marginal cost would not permit the firm to recover its total costs.[207] Therefore, because adherence to marginal cost pricing is not possible, the goal is to determine the "second best" pricing methodology, one that permits the recovery of total company costs while minimizing the adverse impact on consumers' surplus.[208]

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206 See Guidelines for Dominant Carrier's MTS Rates and Rate Structure Plans, CC Docket No. 84-1235, FCC 85-540, released Oct. 17, 1985; AT&T Co., Docket No. 19129, Final Decision and Order, 64 FCC 2d 1 (1977); see generally Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 716-18 (1975).

207 See Kahn & Shew, "Current Issues in Telecommunications Regulation: Pricing," 4 Yale J. on Reg. 191, 223-46 (1987)(hereinafter Issues in Telecommunications Regulation).

208 The consumers' surplus is the difference between the actual price of a commodity or service and the price consumers would be willing to pay for that

114. Although all pricing strategies that depart from marginal costs result in economic efficiency losses, the magnitude of these losses differs, as does the impact on consumers' surplus.[209] There are indications that rate-of-return regulation's reliance on fully distributed cost (FDC) allocations as the basis for pricing results in unnecessarily large harm to consumers. One study, for example, estimates that the welfare loss generated by this pricing methodology exceeds $1 billion annually.[210]

115. On the other hand, a price cap that operates over multiple products can improve the economic efficiency of the rate structure. By limiting only the weighted average of prices, and not each individual price, such a cap permits the regulated firm to pursue price changes that will recover total company costs while concomitantly reducing the loss in consumers' surplus. The firm is led to this result because it also yields greater profit than any other weighted average of prices.[211] Although actual rate changes would necessarily differ among firms, the overarching principle guiding each firm's ratemaking decisions would be to establish prices in such a manner that customers are dissuaded as little as possible from using services. Indeed, a dominant carrier's ability to institute price changes would be subject to very real market constraints. In telecommunications, as elsewhere, demand for a service always falls in response to a price increase. Therefore, any rate increase in excess of directly assignable costs, such as an increase resulting from the assignment of common costs, would cause

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commodity or service. Price decreases, therefore, increase consumers' surplus in the market.

209 See R. Braeutigam, "An Analysis of Fully Distributed Cost Pricing in Regulated Industries," 11 Bell J. of Econ. 183 (1980).

210 See J. Griffin, "The Welfare Implications of Externalities and Price Elasticities for Telecommunications Pricing," 64 Rev. of Econ. & Stat. 59 (1982). This study of toll service estimates a welfare loss of approximately $1.5 billion annually in 1975 dollars. This estimate was adjusted for inflation in a subsequent study to produce an estimate of approximately $3 billion in welfare loss represented in 1985 dollars. See Issues in Telecommunications Regulation, 4 Yale J. on Reg. at 209 & n.38.

211 The beneficial effects of applying price cap-type restraints on rates have been demonstrated extensively in the economic literature. See I. Bradley & C. Price, "The Economic Regulation of Private Industries by Price Constraints," Leicester Univ. Econ. Dept. (1987); I Vogelsang, "Price Cap Regulation of Telecommunications Services: A Long Run Approach," Rand Corp. (1988); T. Brennan, " Capping 'Average' Prices of Regulated Multiproduct Firms," Geo. Wash. Univ. (1987).

demand for that service to fall. Moreover, as discussed in Section IV.C.3.b, infra, we propose to establish additional constraints on potential price changes in the form of rate "bands," which would preclude rate increases or decreases greater than 5 percent per year over and above adjustments required by operation of the price cap formula.

iv. Administrative savings

116. Another area in which price caps represent a clear improvement over rate-of-return regulation concerns the cost of administering regulation. It is universally acknowledged that administering rate-of-return regulation imposes significant direct costs on all parties engaged in this process. The collection and evaluation of a tremendous volume of cost, earnings, and other data are central to almost every aspect of existing regulation, especially the prescription of rates of return, the establishment and administration of cost allocation rules, and the scrutiny of tariff filings.

117. It is reasonable to conclude that at least some of the costs associated with the above-noted regulatory tasks would be saved under price caps because these tasks are not central to the manner in which price cap regulation operates to ensure just and reasonable rates. Such savings are most obviously obtainable in connection with the tariff review process. Currently, for example, carriers and interested parties file literally tens of thousands of pages of cost support, pleadings, and other materials each year in conjunction with the required annual revision of access rates.[212] Under price caps, in contrast, the filing of voluminous materials will generally be unnecessary because a relatively simple check of each carrier's arithmetic is all that is required to confirm that its proposed rates fall within the limitations of the price cap rules.

118. Of course, it may not be possible to achieve significant administrative savings immediately upon initiation of price cap regulation. One naturally would expect to incur administrative costs in connection with the implementation of this, as with any other, new regulatory process. Moreover, the price cap plan we propose in this Further Notice does not purport to eliminate the existing rate-of-return administrative apparatus in its entirety. We will continue to apply existing regulation to the various cost and revenue pools administered by the National Exchange Carrier Association, for example, as well as to carriers that do not elect price cap regulation. Additional short-run costs, however, should be offset by cost savings realized in connection with the preparation of simplified tariff

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212 See, e.g., Annual 1985 Access Tariff Filings, Memorandum Opinion and Order, Mimeo No. 7401, released Sept. 30, 1985, at para. 15 (July 2, 1985 filings included more than 70,000 pages of tariffs, monitoring plan submissions, and cost support materials); see also NTIA Report at 21-24.

filings by carriers electing price caps and by this Commission in reviewing such filings. And the true measure of these direct savings must include a reckoning of opportunity costs, that is, the value obtained by this Commission and carriers electing price caps through the application of direct cost savings to other productive uses.

b. Criticisms of Price Caps

119. We now address the arguments of commenters who suggest that, regardless of the potential benefits of the price cap approach, this form of regulation creates its own set of disadvantages that outweigh its benefits. Essentially, there are three arguments: first, that ratepayers will not share the benefits of price cap regulation; second, that adopting this approach at the federal level may adversely affect state regulation; and, third, that price caps will result in reduced service quality.

i. Sharing benefits with ratepayers

120. A number of commenters contend that carriers subject to price caps will retain the benefits of the efficiencies and innovations this form of regulation should stimulate, instead of passing these benefits on to ratepayers. This alleged deficiency is characterized in several different ways. Some commenters claim that the rates resulting from price caps will be higher than those produced under rate-of-return regulation. Other commenters contend that carriers will earn excessive profits. Neither argument is persuasive.

121. The New York DPS purports to demonstrate that application of price cap regulation would disserve the public interest in the future by attempting a "simple ... test" of what rates would have been produced had this form of regulation been in effect during the period from 1973 through mid-year 1987.[213] To this end, the New York DPS constructed an "actual" rate by estimating the annual "average revenues per message paid by AT&T's residence customers for interstate toll calls."[214] This rate is compared with two models. The first model begins with the 1973 average revenue per minute estimate and adjusts it each year thereafter by the percentage increase in the Consumer Price Index (CPI). The second model adjusts the 1973 estimate each year by the formula CPI minus three percentage points (CPI-3). The comparisons indicate that by 1987 the "actual" rate was 150 percent lower than the rate produced under the first model and 70 percent lower than the rate produced under the second model.

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213 New York DPS Comments at 17.

214 Id. at 16.

122. While we commend the New York DPS for attempting to craft a means of testing the merits of price cap regulation, its proposed methodology is flawed. It is difficult to determine how an "actual" residential revenue per message payment could be calculated because, as far as we are aware, data identifying AT&T's interstate business and residential revenues separately are not publicly available. Moreover, even assuming that New York's "actual" rates are derived from AT&T's average annual revenue per message from all MTS customers during the test period, one naturally would expect such rates to be significantly lower over time than the 1973 rate adjusted thereafter by CPI or CPI-3 because the actual rates reflect changes in separations, tax, and other factors that are not captured through simple CPI or CPI-3 adjustments.[215] Indeed, applying the CPI and CPI-3 formulas to revenue calculations unadjusted for these factors merely compounds the degree of error over time.

123. The attempt made by the New York DPS to test the merits of the price cap approach is a worthy effort, but one that primarily demonstrates the difficulty of attempting "backcast" rate analysis, particularly when the attempt is based on substantially less than comprehensive data and covers a period marked by very large swings in inflation. More importantly for present purposes, this effort underscores the critical importance of including in any price cap adjustment formula some mechanism to account for factors such as separations, access charges, and taxes. The price cap formula proposed in this Further Notice includes such a mechanism, which is defined and discussed infra.[216] As explained more fully in that discussion, this mechanism works in conjunction with the productivity factor to ensure that rates resulting from price cap regulation reflect cost changes underlying carriers' rates, and also to ensure that such rates likely will be lower than those that would result from continuation of rate-of-return regulation.

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215 The New York DPS attempts to provide for such adjustments but we are unable to discern clearly the methodology it used to do so. The entire explanation of its methodology is as follows: "It was assumed that all of the reductions that occurred in actual rates since 1982 relative to the trend of those rates before that time were due to FCC actions and would be reflected in the price caps as dollar-for-dollar reductions." Id. at 17.

216 See Section V.A, infra. We note that AT&T also performed a backcast analysis covering the period from 1984 through mid-1987. AT&T alleges that a weighted average of all MTS rates currently would be 5 percent lower than the weighted average of existing rates if, beginning in 1984, the non-access portion of its MTS rates had been adjusted each year by the CPI, and access charge and separations changes were flowed through on a dollar-for-dollar basis. See AT&T Reply at 30-32.

124. In view of this likely result of price cap regulation, we are unpersuaded by arguments that price caps represent deficient regulation because carriers allegedly will earn "excessive" profits under this approach. Such representations misperceive not only how price cap regulation works but why it likely will place consumers in a better position than continuing to apply existing regulation. The first misperception fails to appreciate the differences between the plan we are proposing and one that merely freezes rates or adjusts them solely in accordance with the CPI. As the proposed New York DPS test indicates, price cap plans that fail to provide some means of adjusting for underlying cost changes quite likely would permit rates to spiral upward rapidly. On the other hand, our proposal takes specific account of underlying cost changes through explicit adjustments to each carrier's price cap based on exogenous carrier-specific cost changes and on a broad measure of productivity that is greater than that historically achieved by dominant carriers.

125. The productivity factor we are proposing to apply assures that ratepayers will share in the benefits of the greater efficiencies and innovations that we expect to result from price cap regulation. Such division of the total gains makes clear that price caps are not a "zero-sum game" between consumers and the firm. The possibility of cost-cutting and innovation permits an outcome in which both parties are better off than under rate-of-return regulation. Thus, self-interested consumers should favor permitting firms the opportunity to earn profits from cost savings, since those very same profits are the basis for consumer benefits as well.

126. It is important to emphasize, however, that reducing a carrier's potential reward for efficiency and innovation diminishes its incentive to undertake the effort necessary for such activity in the first place. This follows from the simple proposition that as the firm's rewards diminish, so will its incentive. Indeed, if ratepayers are judged to be "entitled" to all such gains, no efficiencies or innovations will be forthcoming at all; this would truly kill the goose that laid the golden egg. This last scenario can be likened to "ideal" rate-of-return regulation, in which all cost savings are immediately and completely recaptured. As previously described, while such regulation intends only to hold profits to normal levels, it actually suppresses the activities that create profits -- and provide carriers with the ability to lower rates.

127. Any regulatory commission seeking to promote consumers' interests is therefore faced with a dilemma concerning the ratepayers' optimum share in the firm's profits. Insistence on a 100 percent share likely would leave ratepayers with 100 percent of little or no induced efficiencies or innovations. Some lesser fraction will re-instill incentives in the firm and increase the overall size of the "pie" which ratepayers and the firm share. In other words, the sharing fraction affects not just the division of the pie, but also its very size. In this fashion, price caps become a "positive-sum game" in which both consumers and the firm may benefit.

128. As explained in Section V, infra, we propose to insure that consumers benefit from price cap regulation by extracting from carriers real rate decreases that reasonably can be expected to exceed those which would have resulted if rate-of-return regulation were applied. Will carriers be permitted to retain the profits they are able to achieve in the face of these rate reductions? Yes, and we have no reason to conclude at this time that such profits will be "excessive." The price cap system we propose is not so generous as to allow carriers to earn excessive returns, even if they exert significant efforts. Moreover, we will conduct a comprehensive performance review of each carrier operating under caps at the end of the third year of the plan's operation. To the extent that individual caps require adjustment to lower statutorily-precluded exorbitant rates, we shall do so without hesitation. In the interim, total company earnings will be monitored, we will review rates, and rates will be subject to challenge through the tariff review and the complaint processes.

ii. Impact on state regulation

129. Pursuant to the dual system of federal and state telecommunications regulation established under the Communications Act,[217] telephone company costs are allocated between the state and interstate jurisdictions and recovered thereafter according to applicable federal and state regulatory policies. The Executive Committee of the National Association of Regulatory Commisssioners (NARUC) recently adopted a resolution requesting this Commission to provide assurances, inter alia, that price cap implementation "shall have no adverse effects on intrastate rates, services, or ... jurisdictional allocations."[218] This request merits particular attention because it is this Commission's policy to be both attentive to the jurisdictional division established under the Act and to work with state regulators to ensure effective telecommunications regulation on both sides of the dividing line.

130. As noted previously, jurisdictional allocations are defined and governed by Part 36 of this Commission's Rules.[219] The price cap plan proposed in this Further Notice would not change jurisdictional allocation rules in any respect. Nor would the plan change the Uniform System of Accounts, which is the accounting superstructure for jurisdictional

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217 47 U.S.C. § 152.

218 National Assoc. of Regulatory Utility Commissioners, Proceedings of the Executive Committee Winter Meeting, Resolution Concerning Interstate Price Caps (1988) at 3.

219 47 C.F.R. § 36.1 et seq.

allocations. It is conceivable, however, that in an effort to increase total company profits a dominant carrier might attempt to circumvent jurisdictional allocation rules and procedures by assigning costs inaccurately to either the state or interstate jurisdiction.

131. We note that the incentive to circumvent jurisdictional cost allocations exists under current regulation whenever a carrier operates pursuant to different state and interstate regulatory regimes. We note, for instance, that cost-shifting incentives have arisen in recent years as some states have implemented social contract regulation or rate moratoriums while we have continued rate-of-return regulation. In fact, cost shifting incentives have existed even where both federal and state jurisdictions employ rate-of-return regulation when the two jurisdictions set different earnings limitations, which is a commonplace occurrence.[220] Under rate-of-return regulation, we have attempted to detect such activity by monitoring and analyzing cost data. Our ability to detect such activity has improved recently as a result of implementing a computerized system of collecting carriers' financial and operating data. This system, which is commonly known as ARMIS,[221] allows us to track and analyze costs from their assignment to USOA accounts through the jurisdictional allocation process. As the ARMIS system will be maintained if price caps are adopted, our ability to monitor and detect attempts to "game" the separations process will be preserved.[222]

132. In these circumstances, we tentatively conclude that price cap implementation should not adversely affect intrastate rates, services, or

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220 See, e.g., Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase III, FCC 86-354, 51 Fed Reg. 329320 (Sept. 17, 1986) at App. C (listing of intrastate authorized rates of return). This list, which was compiled when this Commission's prescribed rate of return for both AT&T and the LECs was 12.75 percent, demonstrates that no state-authorized return was identical to the return prescribed by this Commission.

221 ARMIS stands for Automated Reporting Management Information System. For a discussion of ARMIS and its requirements and capabilities, see Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the Commission's Rules), Report and Order, 2 FCC Rcd 5770 (1987).

222 The data submission requirements coordinated through ARMIS also permit us to track costs allocated to the interstate jurisdiction through their apportionment to individual access elements. As the public interest rationale for analyzing such apportionments would not obtain for carriers electing price caps, we propose to eliminate this portion of ARMIS reporting requirements for such carriers.

jurisdictional allocations. In view, however, of the great importance we attach to the separations process and to safeguarding the integrity of jurisdictional allocations, we seek comment on what, if any, unique incentives price cap regulation might create concerning the proper allocation of costs between the federal and state jurisdictions. We also seek comment on what, if any, specific changes in existing monitoring procedures, including ARMIS, might be required to offset any such incentives.

iii. Quality of service

133. Questions addressing the potential that price cap regulation may result in a decrease in service quality were raised by many parties. These parties argue that a carrier subject to price caps might attempt to boost its profits in the short run by declining to take the steps necessary to maintain quality standards. We consider such questions to be extremely important because establishing incentives to provide high quality service should be one of the basic components of any regulatory scheme. In Section VI.B, infra, we discuss existing procedures for monitoring service quality. We tentatively conclude that continuation of these procedures would allow us to detect service quality problems arising during the operation of price cap regulation just as effectively as they do today under rate-of-return regulation. Moreover, we note as a general matter that many forces constrain a carrier's ability to secure higher profits through service quality degradation.

134. First, cutting back on service quality does not necessarily increase profits. Failure to maintain network quality would result in larger blocking percentages, longer down-time for switches and lines, less transmission clarity -- all of which ultimately reduce the number of calls made by customers and, concomitantly, a carrier's revenues. To the extent that the marginal cost saved from quality reductions exceeds the marginal revenue lost from fewer calls, permitting service quality to deteriorate might represent an economically rational strategy in the short run. But the difficulty of making marginal cost and revenue calculations of this nature is not trivial. And, unless the carrier ultimately contemplates going out of business, it will at some point be required to take steps to raise service quality up to acceptable levels. At that point, the constraints imposed by price cap ceilings will make it difficult for the carrier to raise prices and speedily acquire the revenue needed to fund such improvements. Rather than travel such an uncertain road to profitability, it is more likely that a carrier would attempt to stimulate demand -- and its profits -- by improving the quality of its service. Because the market for telecommunications services is growing and appears capable of absorbing substantial increases in outputs, this would appear to be a far more successful, and hence more likely, strategy for a carrier to adopt.

135. A second practical restraint on a carrier's ability to permit service quality to decline is that quality reductions manifest themselves readily and invite a swift response from customers and regulators.

Determining whether a carrier's prices are too high or if it is operating at maximum efficiency is a difficult undertaking, even for experts. But subscribers need no special training to detect an increase in busy signals, or wrong numbers, and static on the line. Moreover, many subscribers of the LECs' interstate access services are themselves large corporations whose profits depend upon high quality service, and who can be expected to respond quickly to any deterioration in service quality that threatens their profits. As for AT&T, the existence of numerous competitors in the interexchange market should limit AT&T's ability to permit its service quality to deteriorate.

136. A third restraint on a carrier's ability to allow service quality to deteriorate is the fact that this Commission currently monitors service quality and would continue to do so under price caps. It bears emphasis here that our current monitoring efforts are compelled by the fact that rate-of-return regulation, in and of itself, provides no clear incentive to maintain or improve service quality. Indeed, service quality problems in the telecommunications industry rose to significant levels in the late 1960s and early 1970s, the period immediately following this Commission's adoption of strict rate-of-return regulatory methodologies.[223] We do not suggest that this policy change caused service quality to decline,[224] no more than it caused or helped cure the service quality problems that arose during the period immediately following divestiture of the Bell System, but we are aware of no evidence that rate-of-return regulation and quality of service are inextricably linked.

137. Against this background and the service quality monitoring discussion in Section VI.B., supra, we tentatively conclude that service quality problems arising during the operation of price cap regulation can be addressed, as they are today, through existing monitoring procedures. We seek comment on this tentative conclusion and invite any suggestions as to additional monitoring procedures that might be appropriate.

c. Competition

138. The record reflects a wide range of opinion about the relationship between price cap regulation and competition. Some commenters assert that the existence of competition is an absolute prerequisite to caps, while others contend that competition is irrelevant. As explained more fully below, neither of these arguments is persuasive. Rather, we conclude that

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223 See A. Carron & P. MacAvoy, The Decline of Service in the Regulated Industries (1981).

224 This view has been expresed by industry observors. See id. at 37; see also Section VI.B.3, infra.

the relationship between competition and price cap regulation is important in two respects. First, unlike the relationship between competition and rate-of-return regulation, the relationship between price caps and competition is complementary. Second, competition is a relevant consideration in determining how to differentiate the implementation of price cap regulation for AT&T and the LECs.

139. Although many commenters maintain that price cap regulation is inherently "light handed" and useful only for the limited purpose of establishing a bridge to eventual deregulation, such claims cannot be reconciled with the fact that this form of regulation has been applied successfully to monopoly services in Great Britain for several years. And, as discussed previously, several states currently apply price cap-type principles in regulating intrastate monopoly services. This actual experience with price cap regulation in monopoly environments belies any suggestion that this approach cannot be effective unless competition exists in the market for a dominant carrier's services. Moreover, our review in this Further Notice of the various rationales offered in support of the "competition is a prerequisite to caps" argument -- such as claims that price caps will cause the quality of service to decline -- leads us to conclude that such concerns can be addressed more than adequately through the application of regulatory procedures built into our price cap proposal, such as the monitoring of service quality.

140. Indeed, as a theoretical matter, one might conclude that price cap regulation would be <u>most</u> appropriate in markets characterized by the fewest competitive alternatives. After all, it is in such markets that the distorted incentives rate-of-return regulation creates are the least offset by competitive market forces and, therefore, that the benefits of price caps are likely to be greater.

141. It does not follow from this discussion that the existence of competition is irrelevant to our considerations concerning price cap regulation. For example, a very important advantage of this regulatory approach is its ability to promote the public interest more effectively than rate of return when applied in situations where some degree of competition exists. As noted previously, there is a natural tension between competition and rate-of-return regulation because in the face of competition a carrier operating under rate-of-return methodologies has an incentive to shift costs to and secure higher prices for its monopoly services. Moreover, the traditional rate-of-return regulatory "cure" for such activity -- fully distributed cost (FDC) allocation requirements -- may distort the competitive process itself, either by inviting cream skimming by competitors if the regulated carrier's FDC prices are too high, or by deterring economically efficient competitive entry if the regulated carrier's FDC prices are too low. Price cap restraints, on the other hand, blunt a carrier's incentives to shift costs from more to less competitive services because prices will be constrained by a predetermined cost-predicting formula that is outside the carrier's direct control, rather than by accounting costs the carrier reports

to this Commission. Moreover, because rigid FDC cost allocation methodologies are not used to limit a carrier's price changes under price cap regulation, the distortive effects of such methodologies on competition would diminish under this regulatory approach. Therefore, we tentatively conclude that the ability of the price cap approach to achieve public interest benefits without distorting the competitive process represents an additional rationale for applying price cap regulation to dominant carriers.

142. The degree of competition in markets served by dominant carriers also is a relevant consideration in deciding how to apply price cap regulation in each market. A principal reason for this is the fact that the discipline competition applies to a carrier's pricing policies can be incorporated into the regulatory scheme as an additional tool to ensure that prices are just, reasonable, and non-discriminatory. No commenter has provided, nor can we perceive, a reason why the price cap approach must be implemented in an identical fashion in the markets for interstate access and interstate interexchange services. We review below evidence of competitive forces in each of these markets.

143. Available data indicate that AT&T's share of the interstate interexchange market is significantly less than 100 percent and, moreover, has been declining steadily in recent years. For example, this Commission's Industry Analysis Division tracks and reports AT&T's share of "switched access minutes," that is, those minutes of interstate traffic transmitted by long distance carriers that also use the switched distribution networks of local telephone companies.[225] The most recent report demonstrates that AT&T's market share has declined substantially since mid-1984.[226] At that time, its overall share was 84.2 percent, and its share of "premium" minutes (those served by equal access) was nearly 99 percent. Both its overall and premium minute market shares have undergone substantial decline since 1984. By the end of 1987, AT&T's overall share was under 70 percent, and its share of premium minutes (which presently constitute 95 percent of switched access minutes) was only slightly larger.

144. These facts do not imply that AT&T is without remaining market power, nor that it will inevitably continue to lose market share. However, its market share clearly is eroding, and this fact attests to the significantly greater constraints imposed on that remaining market power by other interexchange carriers. Data on those interexchange carriers also are

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225 See "AT&T's Share of the Interstate Switched Market: Fourth Quarter, 1987," Industry Analysis Division, FCC, Mar. 20, 1988.

226 It should be noted that switched access minutes do not encompass all long distance telecommunications minutes, such as those traversing interstate private lines and leased lines.

tracked and reported by the Industry Analysis Division.[227] These data show that as of the end of 1987, 239 companies purchased equal access from the Bell Operating Companies, and hence appear both to originate and terminate traffic in a state. More than twice that number -- some 540 companies -- purchased switched access at the end of 1987.[228]

145. These several hundred carriers are not all of equal size and competitive significance. Some observers contend that the number of facilities-based carriers is important in evaluating the relative strength of competitive forces because such carriers are not dependent on other carriers for transmission services. These observers also note that the number of facilities-based carriers is far smaller than the just-cited numbers. Even if one assumes that facilities-based competitors restrain a dominant carrier's market power more strongly than other carriers, the fact remains that there are several facilities-based carriers with extensive national or regional networks. For example, MCI serves 48 of the 51 jurisdictions for which the Commission has data, US Sprint serves 47, Western Union serves 40, ITT/USTS serves 37, and Allnet serves 31.[229] Moreover, AT&T has placed evidence in the record indicating that 95 percent of long distance traffic is generated in LATAs served by three or more such facilities-based carriers.[230]

146. In addition to these measures of current competition, certain trends would indicate continued, and indeed heightened, interstate interexchange competition in the future. In particular, the rapid deployment of fiber optic systems, fostered by substantial technological advances and price decreases, has vastly increased the capacity of the nationwide telecommunications network. There are now five extensive fiber systems in place, those belonging to AT&T, MCI, Sprint, Lightnet, and NTN.[231] Each of the first three appears to have had sufficient fiber optic technology in place

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227 "Summary of Long Distance Carriers," Industry Analysis Division, FCC, Mar. 23, 1988.

228 The difference between the 239 and 540 figures likely can be attributed to the fact that the latter calculation captures interexchange carriers that purchase switched access in some states only for the purpose of terminating calls in those states. See id. at 3.

229 Id.

230 See AT&T Comments, App.A (testimony of Porter, "Competition in the Long Distance Telecommunications Market").

231 See "Fiber Deployment Update: End of Year 1987," Industry Analysis Division, FCC, Jan. 1988, at 2.

by late 1986 to accommodate all domestic interLATA traffic, and even allowing for temporal and geographical peaking requirements, the evidence suggests that capacity in place or on the horizon considerably exceeds reasonably anticipated demand for many years.[232] Moreover, this capacity is both long-lived and sunk, characteristics that significantly increase the likelihood of continued competition by present or future owners of the fiber systems.[233]

147. The market for most interstate services provided by LECs appears to be characterized by less competition than exists in the market for interstate interexchange services. The development of shared tenant systems, private networks, and other technologies, however, suggests an increasing degree of competition in some markets served by LECs. Although there is evidence suggesting that the long-run prospects for competition in interstate access markets are significant,[234] and that appreciable competition may already exist in certain portions of particular interstate access markets,[235] the record does not contain demonstrate that existing levels of competition in the interstate access market are as substantial or pervasive as that which exists in the market for interstate interexchange services.

148. This Commission has a long-standing policy of structuring regulation in a manner that both avoids any harm to developing competition and attempts to take advantage of the existence of competition in order to make regulation more effective. In view of this policy and the evidence of competition reviewed above, we tentatively conclude that the different degrees of competition present in the markets for interstate interexchange and interstate access services provides a basis for differentiating the manner in which price cap regulation is implemented for AT&T and the LECs. As discussed in more detail in Sections II.D, IV, and V, infra, we currently are proposing only a limited amount of differentiation, consisting principally of the number of individual services we will require AT&T and the LECs to group into a

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232 AT&T Comments, App. A (testimony of Porter).

233 See J. Haring & E. Kwerel, "Competition Policy in the Post-Equal Access Market," Office of Plans and Policy, FCC, Working Paper No. 22, Feb. 1987, at 3.

234 See, e.g., "Third Report on Bypass of the Public Switched Network," Common Carrier Bureau, FCC, May 26, 1987 (numerous non-LEC suppliers of telecommunications technologies and services are available to serve large users by assembling systems providing specialized services).

235 See, e.g., Ameritech Reply at 19 & Attachment C ("[T]here are dozens of firms providing or positioned to provide access services to high volume and aggregated customers [in the Chicago area].").

single price cap basket,[236] as well as issues concerning the timing of price cap implementation for common line cost recovery and alternative methods of such recovery. We seek comment on our tentative decision to rely upon competitive distinctions between the interstate interexchange and interstate access markets as a means of differentiating price cap implementation for AT&T and the LECs, as well as the degree of differentiation we are proposing. We also seek comment on whether the degree of competition in the interstate, interexchange market warrants providing AT&T with greater flexibility than proposed in this Further Notice.

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236 If they elect price cap regulation, our proposal requires AT&T and the LECs to group all switched services into a single basket for purposes of price cap regulation. This affords AT&T greater flexibility than the LECs because it offers a variety of segregable switched services, while nearly all switched access elements offered by the LECs combine to form a single switched service offering.

D. Price Caps for Local Exchange Carriers

1. Summary of Notice

149. In the Notice, we tentatively concluded that prompt application of price cap regulation to both AT&T and the LECs would be in the public interest.[237] We also tentatively concluded, however, that such regulation should be implemented for AT&T prior to implementation for the LECs because implementation for the latter carriers raises issues more complex than those for AT&T.[238] We identified two particular implementation difficulties. The first concerns present pooling arrangements among the LECs, both the mandatory pooling of non-traffic sensitive (NTS) common line costs by all LECs and the voluntary pooling of traffic sensitive (TS) costs by many smaller LECs. We noted that the existence of two pools, and the process of implementing NTS pooling modifications scheduled to occur during 1989, presented administrative difficulties that might necessarily delay price cap implementation for LECs.[239] The second concern arises as a result of the rich diversity among the more than 1400 LECs providing interstate access service. We noted that some are very large and others quite small, both in terms of their annual revenues and the number of access lines they provide. We noted as well their different corporate structures, and the fact that, in accordance with existing rules, they provide interstate access through distinctly different tariff arrangements.[240] We sought comment on these and any other implementation issues that would need to be resolved prior to the application of price caps for the LECs.

2. Pleadings

a. In General

i. Simultaneous implementation

150. The commenters are divided regarding whether to apply price cap regulation to AT&T and the LECs simultaneously.[241] AT&T cautions that

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237 Notice, 2 FCC Rcd at 5221 (para. 75).

238 Id. at 5208 (para. 3).

239 Id. at 5221 (para. 75).

240 Id. (para. 76).

241 Some commenters state that the issue of whether price caps should apply to the LECs is not yet ripe for resolution because it did not receive adequate consideration in the Notice. MCI Reply at 40; Maryland PC Reply at 2-3. IDCMA similarly refers to the "amorphous" nature of the price cap

a LEC price cap plan will involve complex administrative issues, particularly in relation to pooling arrangements and the diversity among the 1400 LECs,[242] but supports price caps for the LECs as long as the approach adopted accounts for their dominant market position.[243] AT&T submits that price cap regulation for the LECs would have to substitute for market forces in a number of respects. It argues, for example, that the new regulatory approach should assure reasonable rate levels, guarantee non-discriminatory pricing, protect against cross-subsidization, and ensure acceptable service quality.[244] As a result, AT&T proposes a mandatory price cap plan for the LECs which would include more than one cap as well as service-specific adjustments to assure that the LECs do not take advantage of their monopoly power.[245]

151. Most BOCs and major independent telephone companies favor simultaneous implementation.[246] In contrast to AT&T, however, several of these parties submit that the monopolistic nature of the local exchange marketplace warrants implementation of price caps for the LECs, or that the benefits of price cap regulation will accrue regardless of the presence of competition.[247] NYNEX, for example, asserts that price caps constitute an

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proposal. IDCMA Reply at 12. Other commenters have suggested that we institute a further proceeding to investigate application of price caps to the LECs. E.g., Contel Comments at 8-9; USTS Reply at 5; US Sprint Comments at 14; NTN Reply at 17; McCaw Reply at 4; TCA Reply at 4; UTC Reply at 4; Michigan PSC Comments at 12-13. Contra Ameritech Reply at 42 (another rulemaking would be unproductive and would delay consumer benefit). The issues raised by these parties are moot in light of the adoption of this Further Notice.

242 AT&T Comments at 64 & n.**.

243 AT&T Reply at 38.

244 AT&T Comments at 64 n.#.

245 See generally AT&T Reply at 38-56. MCI similarly opposes an aggregate cap for the LECs. MCI Reply at 54.

246 E.g., SWB Comments at 15-16; US West Comments at 22-26; GTOC Comments at 8; United Comments at 17; Rochester Comments at 21; SNET Comments at 7; Centel Comments at 16-17; USTA Comments at 11; Taconic Reply at 3. The Alabama PSC contends that application of price caps to AT&T alone could lead to bypass as well as toll rate deaveraging, which could be disastrous for the rural customer. Alabama PSC Comments at 7.

247 E.g., GTOC Reply at 6; USTA Reply at 15-17.

appropriate and effective substitute for competition.[248] BellSouth contends that if, as some parties argue, the local exchange market is not sufficiently competitive to sustain price cap regulation, the benefits of price caps in terms of efficiency incentives will be even greater as applied to the LECs than as applied to AT&T.[249] United agrees, and asserts that cost effectiveness and incentives for innovation will occur regardless of the degree of competition in a particular market.[250] Centel notes the greater potential for efficiency gains in the local exchange markets, since many technological improvements have already been implemented in the interexchange market.[251] In addition, some commenters submit that non-concurrent application of price caps will force this Commission to maintain two separate regulatory structures,[252] while Ameritech urges that simultaneous implementation is necessary for "telecommunications market coherency."[253] OPASTCO notes that average schedule companies already operate under a regime akin to price cap regulation in that their rates are based on average costs for similarly situated carriers, and asserts that this has not led to predation or exorbitant rates.[254]

152. Many proponents of simultaneous implementation also predict that AT&T will otherwise bypass LEC facilities.[255] Several commenters point

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248 NYNEX Comments at 25-26.

249 BellSouth Reply at 12-14.

250 United Reply at 3.

251 Centel Reply at 9.

252 E.g., BellSouth Reply at 16-17; SWB Reply at 5-6; PRTC Reply at 4-5.

253 Ameritech Comments at 13.

254 OPASTCO Comments at 2-3.

255 BellSouth Comments at 44, App. A at 25 (testimony of Kahn and Shew); NYNEX Comments at 24; SWB Comments at 24-25; US West Reply at 38; CBT Reply at 2; SNET Comments at 11; GTOC Comments at 8-9; Centel Reply at 10; Rochester Reply at 8; USTA Reply at iii; United Reply at 5; PRTC Reply at ii, 4; CCIA Reply at 9; Alabama PSC Comments at 7; cf. NTN Comments at 34 (neither it nor its members use bypass facilities for more than 5 percent of their traffic, but they would bypass more often if they could). The GTOCs postulate that if AT&T's prices are capped first, AT&T may be committed to its bypass alternatives by the time caps are instituted for the LECs. GTOC Comments at 9. Contra AT&T Reply at 58-59 (rate-of-return regulation does not prevent LECs from lowering their access rates to thwart bypass); MCI Reply at 49 n.45 (any innovations needed to respond to the threat of bypass can be

out that local exchange costs represent more than half of all interstate costs.[256] They contend that since AT&T would have an incentive to reduce these costs under price cap regulation, it would bypass LEC facilities in favor of alternative local exchange access arrangements. CBT submits that the loss of revenues due to bypass would lead to higher local service rates to the detriment of consumers.[257] Even if price cap regulation is applied to AT&T and the LECs concurrently, CBT recommends that this Commission develop safeguards against bypass to protect those LECs not in a position to reduce access-related costs to competitive levels.[258]

ii. Voluntary implementation and other approaches

153. A few parties suggest that a voluntary price cap plan would limit industry disruption and would maximize consumer benefit and efficiency under price cap regulation.[259] Ameritech asserts that an optional plan would allow the pools to remain undisturbed, and would not alter the incentives for pool entry and exit.[260] Moreover, some commenters maintain that an optional

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handled through the existing regulatory framework); Comptel Reply at 28; Ad Hoc Reply at 9; ADAPSO Reply at 10; NASUCA Reply at 28.

256 Bell Atlantic Comments at 7; SWB Comments at 15; US West Comments at 23; Ameritech Comments at 13; United Comments at 16. Cf. Cable & Wireless Comments at 11 (increases in local exchange access rates which would result from capping the LECs' rates would adversely affect the interexchange market because local exchange rates represent half of the interexchange carriers' costs).

257 CBT Reply at 2-3.

258 Id.

259 E.g., NYNEX Comments, App. B at 17 (testimony of Levin); Ameritech Comments at 14; Centel Comments at 19-20 (price caps should be optional for LECs serving under 50,000 access lines that do not file their own tariffs); CCIA Reply at 9-10. Contra AT&T Reply at 48-49 (if price caps are voluntary and a single average efficiency factor is used for all LECs, less productive LECs will remain under the current system, while LECs with higher expected productivity will opt for price caps, capturing the benefits of efficiency gains for themselves; this will eventually cause overall access rates to exceed the level that changes in average productivity would otherwise require).

260 Ameritech Comments at 14-15, 36.

price cap plan would alleviate the diversity problem since establishing price caps on a voluntary basis would reduce the number of participants.[261]

iii. Delayed implementation

154. Other parties contend that implementation of price caps for the LECs should be delayed, particularly in light of the dearth of competition in the local exchange marketplace.[262] For example, ALC maintains that price cap regulation could allow a LEC to increase its profits by reducing investment in the network, reducing or eliminating maintenance, and laying off personnel without running the risk that it will lose market share.[263] In addition, Ad Hoc asserts that the investigation and elimination of LEC strategic pricing practices must be completed before application of price caps to the LECs,[264] while Illinois argues that price cap regulation for the LECs will interfere with state regulatory reforms.[265]

155. Other parties assert that if this Commission deems delayed implementation of price caps appropriate for the LECs, we should forego implementation for AT&T, at least until an acceptable LEC plan is developed. Contel argues, for example, that the benefits of concurrent application of price caps should not be sacrificed for administrative expediency, even if it means that price caps must be delayed for AT&T.[266] NTIA, conceding that implementation for the LECs could take longer than for AT&T due to the differing degrees of competition, states that the LEC plan need not be

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261 E.g., Rochester Comments at 20-21; CCIA Reply at 10.

262 See Comptel Comments at 28; MCI Reply at 4; ALC Comments at 36 (opposes price cap plan for AT&T and the LECs); USTS Comments at 3; Locate Comments at 4; NTN Comments at 11; Cable & Wireless Comments at 11; ALC Reply at 29-34; API Comments at 10; ANPA Reply at 5; CCTU Comments at 15; GECS Reply at 4; ADAPSO Reply at 10-11; NASUCA Reply at 28; IDCMA Reply at 12 (both the LECs and AT&T remain dominant in their respective markets); Citizens Comments at 16; Missouri PSC Comments at 5, 6-7 (reserves judgment on implementation for AT&T). See also Florida PSC Comments at 1 (price caps should not be extended to the LECs until experience is gained with AT&T); Virginia Comments at 7 (agrees with the Notice as to the status of the LEC market).

263 ALC Reply at 34.

264 Ad Hoc Comments at 17; see also id., ETI Report at 26-28 (1988 LEC tariffs are not without error).

265 Illinois Comments at 30.

266 Contel Reply at 12.

instituted simultaneously but should occur "expeditiously" so as not to impede any benefit to consumers.[267] Using a staggered implementation schedule, Pactel's "Pacific Plan" would cap some LECs immediately and delay implementation for others.[268] NECA, proposing a similar scheme, recommends that those carriers which now file their own traffic sensitive tariffs could be capped first and that once LECs are allowed to file their own common line tariffs, individual LEC rates could be placed under caps.[269]

b. Diversity and Pooling

156. Few parties view diversity as a barrier to a LEC price cap plan. BellSouth submits that while it is more complex to apply price caps to 1400 LECs than to AT&T, it is less complex than administration of rate-of-return regulation.[270] It points out, for example, that the Part 65 Rules prescribe a single overall rate of return for all LECs despite the variety in carrier capital structures and sources of financing.[271] Bell Atlantic also maintains that implementation of price caps for the LECs would be simpler than for AT&T, stating that AT&T's domestic MTS and WATS tariffs include 991 different rate elements while its own switched access tariff includes only 115.[272] NTIA observes that this Commission has in the past developed rules which respond to differences among carriers, such as our cost accounting and cost allocation procedures.[273] Some commenters suggest that the solution to diversity lies in the calculation of the adjustment mechanism, particularly the productivity factor. SWB recommends, for example, that we use different productivity factors for different categories of carriers.[274] In addition,

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267 NTIA Reply at 4.

268 See Pactel Comments at 22-27.

269 NECA Reply at 6-7.

270 BellSouth Comments at 40.

271 Id.

272 Bell Atlantic Reply at 5.

273 NTIA Reply at 7.

274 SWB Comments at 12; see also United Comments at 16 (use of an industry-wide LEC productivity factor should eliminate any major administrative problems); SNET Comments at 10 n.16 (LEC size and diversity could be reflected in the adjustment formula); Centel Reply at 12 (most price cap adjustments, such as inflation and separations or tax changes, are industry-wide; differences in productivity can be resolved through use of a productivity adjustment).

some parties maintain that the diversity problem can be alleviated by setting initial caps for similar companies at the same time.[275]

157. Similarly, most of the BOCs and major independent telephone companies commenting on the administrative problem of accommodating existing pooling arrangements believe that it is not an insurmountable obstacle. Several parties suggest that the smoothest transition to price caps can best be accomplished if pooled elements, particularly Carrier Common Line (CCL) charges, remain subject to rate-of-return regulation while other elements are capped.[276] For example, Ameritech proposes a voluntary approach whereby a LEC choosing price cap regulation could use caps for everything other than the CCL element, which would be kept under rate-of-return regulation until depooling.[277] At that time, companies which choose to leave the CCL pool could elect price cap regulation, although they would continue to contribute to the pool.[278]

158. Some commenters emphasize the benefits of pooling for small LECs and caution against extensive disruption of the current process.[279] For example, SWB asserts that since pooling provides a useful service to smaller LECs, the initial price ceiling for depooling carriers would have to be set so as not to encourage LECs to leave the pools.[280] NECA asserts that before it

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275 See, e.g., Rochester Comments at 20-21.

276 See, e.g., NYNEX Comments at 26-28 (LECs could retain rate-of-return regulation for that portion of their interstate revenues which is pooled so as to minimize administrative complexity); Bell Atlantic Reply at 7-8 (the CCL charge would not be subject to price caps until the end of mandatory pooling, and even then carriers would maintain their long-term support obligations); BellSouth Comments at 41-42 (the NTS pool would operate under rate-of-return regulation until it becomes voluntary, whereupon existing transitional and long-term support flows would be treated as automatic adjustments to the base year price cap for LECs leaving the pool); United Comments at 15 (CCL rates would continue under rate-of-return regulation until the carrier leaves the pool).

277 Ameritech Comments at 36.

278 Id. at 37. See also id. at 37-39 (discussing the use of Part 36 and Part 69 of this Commission's Rules to develop CCLC for pooling companies, as well as to calculate support to be paid by non-pooling companies).

279 E.g., USTA Comments at 24; Taconic Comments at iii, 6-7; NTCA Comments at 3.

280 SWB Comments at 9.

can determine whether price caps are appropriate for its pools, it must re-evaluate its current operations and research the needs of its members.[281] If this Commission adopts price caps in the meantime, NECA submits that they should be optional for the pools.[282]

159. USTA proposes that price cap regulation remain an option for small depooling LECs and contends that this Commission should allow NECA to develop alternative rate structures for pool pricing flexibility in the price cap environment.[283] The USTA LEC plan provides that all pool support obligations, both long-term and transitional, will be maintained as part of the NTS cost recovery mechanism under the price cap.[284] USTA further proposes that changes in pool support flows should be reflected in changes to the price cap. It contends, however, that cost changes due to inflation and productivity should not be applied to the NECA pool component of a LEC's price cap since the pool flow will be a known, fixed obligation once annual pool flow data are collected.[285] Several other carriers champion the USTA LEC plan.[286]

160. Pactel states that it has designed a price cap plan to address concerns of small companies which will improve efficiency and reduce administrative costs with minimal disruption to existing pooling arrangements.[287] Under Pactel's "Pacific Plan," LECs filing their own tariffs which will leave the NECA pool when mandatory pooling ends would be eligible for price cap regulation immediately.[288] Pactel submits, however, that CCL and End User Common Line (EUCL) charges that recover NTS costs would remain

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281 NECA Comments at 2.

282 Id. at 2-3. NECA further urges that it is unnecessary to retain the Docket 84-800 requirements for the pools since pool performance can be evaluated on an individual basis. Id. at 3.

283 USTA Comments at 25.

284 USTA Reply at 23.

285 Id.

286 E.g., BellSouth Reply at 15; US West Reply at 41 & n.96 (agrees with USTA proposal as to transitional and long-term support of the Unity 1-A agreement); United Reply at 6; NTIA Reply at 6 n.6.

287 See generally Pactel Reply at 8-11.

288 Pactel Comments at 2-3.

outside the price cap scheme between initial implementation and the April 1, 1989 depooling. After that date, LECs already under price cap regulation would establish their own CCL charges under the cap, while EUCL would remain outside the cap at Commission-mandated levels.[289] Pactel suggests that this Commission could, when feasible, extend price cap regulation to LECs remaining in the NECA pools.[290]

161. SWB ultimately favors a plan which would create efficiency incentives within the pools by capping the NECA rates and basing compensation on efficiency gains, including cost reduction, rather than on costs.[291] Recognizing that the development of incentives within the pools will take longer than for non-pooled elements, however, SWB proposes an interim plan by which carriers participating in the pools would be subject to price cap regulation for any of their non-pooled interstate services.[292] The pooled services would remain under rate-of-return regulation until the desired incentives are implemented or until the carrier withdraws from the pool.[293]

162. Other commenters contend that the retention of rate-of-return regulation for pooled services would deny small carriers the benefits enjoyed by larger LECs that operate under price caps,[294] and a few carriers suggest ways to apply price caps to the pools.[295] AT&T cautions that leaving the pools under existing regulation could lead a carrier to shift costs from its capped to uncapped categories, which would cause overall price increases.[296] It therefore recommends that this Commission refrain from applying price caps to any LEC interstate services until they are applied to all, effectively conditioning price cap eligibility on a LEC's withdrawal from the NECA pools.[297]

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289 Id.

290 Id. at 3, 23-24.

291 SWB Comments at 7.

292 Id.

293 Id.

294 E.g., Taconic Reply at 6-7; OPASTCO Reply at 4-5.

295 For example, Taconic would treat the NECA pool like a large carrier and suggests that this Commission cap NECA's rates and allow carriers to move freely in and out of the pool. Taconic Comments at 6-7.

296 AT&T Reply at 44.

297 AT&T Reply at 45. See also Rochester Comments at 20 (price caps should

163. AT&T also maintains that CCL charges should be capped and adjusted separately. It notes that CCL rates cover LECs' switched NTS costs, not recovered from end users through SLCs,[298] and submits that because the LECs' NTS costs are essentially fixed, unit costs fall as traffic volume rises, leaving LECs with a windfall benefit not achieved as a result of productivity improvements.[299] To alleviate this problem, AT&T suggests that CCL rates should be capped initially and subsequently adjusted to account for growth.[300]

164. Ameritech and Bell Atlantic disagree with AT&T. Ameritech contends that AT&T's analysis is flawed because, under the USTA LEC plan, the NTS pool will not be affected by price caps until 1989.[301] After 1989, Ameritech argues, changes in demand will be reflected in the productivity factor contemplated by the USTA proposal.[302] Bell Atlantic states that while NTS costs for an individual line do not fluctuate with the amount of traffic carried by that line, total NTS costs do increase with access line growth.[303] Moreover, Bell Atlantic contends, inflation causes a rise in NTS costs just as it leads to increases in other costs. As a result, Bell Atlantic maintains, there is no basis for reducing the NTS cap for traffic increases.[304]

3. Discussion

165. As we observed in the Notice, implementing price caps for the LECs raises difficult and complex issues. This is not because of any weakness in either the theory underlying the price cap approach or any unique problem associated with its on-going administration. Rather, these issues largely reflect the difficulties that naturally accompany a transition from one regulatory system to another. They fall into three general categories. The

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be applied to LECs only if they leave the pools).

298 AT&T Reply at 50.

299 AT&T Comments at 65 n.*.

300 Id. at 51.

301 Ameritech Reply at 39 n.73.

302 Id.

303 Bell Atlantic Reply at 7 n.9.

304 Id.

first concerns the question whether price caps should be implemented for AT&T and the LECs simultaneously or an a staggered basis, beginning with AT&T. The second concerns the question of how to apply caps in an environment in which many carriers pool costs and revenues. The third issue, which we examine here de novo, addresses the perceived difficulty of including the recovery of common line costs in our proposed price cap plan. We address these issues in turn, beginning with the least vexing among them, namely, those in the first category.

a. Staggered vs. Simultaneous Implementation

166. Delaying implementation of price caps for the LECs necessarily would defer the full attainment of the consumer benefits we expect to obtain through this form of regulation. We are not pursuaded by the arguments for delay presented thus far by commenters.

167. We are particularly unpersuaded by arguments that price caps for the LECs should be deferred because of the asserted lack of competition in the provision of interstate access services. This is not an argument for deferral, however: it is an argument for a ban on price caps for LECs because it is unreasonable to expect that significant competition will develop in the foreseeable future in all markets served by such carriers. As noted previously, making the existence of competition a prerequisite to price cap regulation, as these commenters contend, is illogical. The price caps approach does not constitute deregulation. It is an alternative form of regulation, and the rationale for applying price cap regulation may be strongest in situations in which competitive forces are weakest.

168. We are similarly unpersuaded by the argument that inplementation for the LECs should be deferred until this Commission garners some "experience" with price cap regulation through its application to AT&T. The major flaw in this argument is that it presents no basis for going forward with AT&T first, as opposed to the LECs. Moreover, many of these same commenters argue that significant differences exist between AT&T and the LECs. Assuming, arguendo, that relevant differences exist, this raises the question of how lessons learned in connection with price cap regulation of AT&T would permit us to draw any reasoned conclusions about its effectiveness as a model for LEC regulation.

169. It does not follow from the preceding discussion that simultaneous implementation of price caps for AT&T and the LECs is required in order to prevent harm to the public interest. The observation by many commenters[305] that LEC charges represent nearly 50 percent of AT&T's interstate costs underscores the importance of instituting regulatory reforms

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305 See, e.g., Ameritech Comments at 13.

tailored to encouraging efficient LEC operations, but this does not establish a rationale for tying such reforms to those instituted in connection with the regulation of AT&T. Many commenting LECs, however, maintain that asymmetrical application of price cap regulation would greatly increase AT&T's incentive to engage in bypass. This argument is not well developed in the current record. While the use of private facilities and special access services to bypass local exchange carriers remains a significant concern of this Commission, it is not obvious that AT&T's bypass incentives under price caps would be any greater if the LECs were not also subject to price caps. Bypass incentives would be particularly attenuated if price cap implementation for LECs were delayed for just a short period because the decision to engage in bypass often requires long-term financial commitments to the bypass technology selected, commitments that would be imprudent if made only to secure short-term price savings. In view of the importance of this issue, however, and the current underdeveloped state of the record, we seek further comment on the issue of bypass.[306]

b. Diversity and Pooling

i. Diversity

170. Our tentative decision to permit carriers to elect price cap regulation substantially reduces the level of the concern we expressed in the Notice about implementing price cap regulation for LECs. In one respect, that concern arose from the fact that the rich diversity among the LECs would make it difficult to devise a relatively simple price cap formula that could be applied to all LECs on a rational and fair basis. Although we believe this difficulty has been overcome, see Section V, infra, the fact that price cap regulation will be elective for AT&T and the LECs at this time quiets the concern that application of our proposed formula would unintentionally force a hardship on any particular LEC and, more importantly, on the ratepayers served by any particular LEC.[307]

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306 Interested parties responding to our request for comment on this issue should take note of our tentative decision in this Further Notice to retain under price cap regulation the existing, prescribed Part 69 switched access rate structure. See Section VI.C.5.b, infra. Therefore, LECs subject to price cap regulation would be required to seek waiver of our Rules in order to offer alternative switched access services.

307 In conjunction with our tentative decision to permit dominant carriers to elect price cap regulation, we also tentatively conclude that LECs exercising the option to elect such regulation must do so on an "all or nothing basis." That is, a LEC electing price cap regulation for one of its study areas must do so for all of its study areas, and all affiliated LECs must elect price cap regulation if one of a group of affiliated LECs elects price cap regulation. This tentative decision is designed to limit potential

171. AT&T argues that consumers may not receive the full benefit of efficiency gains if dominant carriers are provided an option to elect price cap regulation. Essentially, AT&T claims that carriers with higher expected productivity growth will opt for price caps and capture for themselves the benefits of these efficiency gains, while those with lower expected productivity growth will opt for rate-of-return regulation and their prices will reflect this lower effeciency. Over time, AT&T contends, prices will be higher.[308] AT&T asserts that one way to "solve this problem" is to make price cap regulation mandatory for all LECs.[309] We are not persuaded by AT&T's argument.

172. AT&T is describing a phenomenon known in the literature as "adverse selection," which obtains when a principal bargains with one or more agents and all of the agents have information superior to the principal's. In such situations, the principal's offer will be accepted only by those agents whose superior information about their own capabilities permits them to determine in advance that they can profit by accepting the principal's offer. In the instant context, however, this phenomenon would be important only if many individual carrier's potential productivity gains differed significantly from potential productivity gains for the industry as a whole, and if the individual carriers knew of the differences in potential productivity but this Commission did not know of them. As discussed more fully at Section V.B, infra, available evidence indicates that dominant carriers historically have achieved approximately 2.5 percent greater productivity than that experienced by the overall economy. There is no evidence in the record that productivity

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incentives to allocate common costs improperly between a study area or LEC subject to price cap regulation and study areas or affiliated LECs remaining under rate-of-return regulation. We have adopted rules of this nature in order to limit similar potential incentives. See 47 C.F.R. § 69.3(e)(9); see generally MTS and WATS Market Structure, CC Docket Nos. 78-72 and 80-286, Recommended Decision and Order, FCC 87J-1, 2 FCC Rcd 2324, 2340 (1987).

308 AT&T's argument is based on assumptions that price cap regulation is optional and that the productivity component of the formula used to adjust each carrier's price cap is the same for all LECs, as opposed to being calculated for each LEC or for categories of LECs. AT&T Reply at 49. These assumptions conform to the plan we are proposing. As discussed more fully in Section V, infra, we also are proposing to apply to AT&T, if it elects price cap regulation, the same productivity factor as applied to LECs electing such regulation.

309 Id.

gains for individual carriers vary from this 2.5 percent calculation when measured on a long-run basis.[310]

173. This is not to say that carriers' productivity gains could not vary from year to year. Under price cap regulation, however, carriers largely assume the risk of such fluctuations -- a risk that is balanced against the opportunity provided under this form of regulation to achieve higher than average earnings. And it is highly unlikely that any carrier could know today precisely what its productivity gains will be each year into the future. Although all carriers engage in long-run business planning, this exercise necessarily involves estimating factors such as inflation and technological progress that are beyond a carrier's ability to control. Beyond a very short time frame, such estimates become, at best, reasoned guess-work.[311] Moreover, even though we tentatively are proposing to give carriers the option of electing price caps initially, this alternative regulatory system is designed to be a long-term replacement for existing rate-of-return regulation, and we might, depending on this initial experience, ultimately decide to make price caps mandatory for certain carriers. Under the current proposal, however, carriers electing price caps cannot return to rate-of-return rules and procedures at their own choosing if their business plans prove to be inaccurate. We tentatively conclude that the combination of these factors reduces the possibility that the election option could be manipulated in the short-run in ways that would harm the public interest.

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310 As discussed in Section V.B, infra, we are requesting LECs and AT&T to supply evidence of their past productivity that would be useful in evaluating whether productivity varies widely among carriers on a long-term basis relative to the total industry calculation. Our own examination of AT&T's productivity during the past four years indicates that its annual productivity increases have been on the order of 2.5 percent above those achieved economy-wide. See Appendix C. If long-term productivity gains vary widely among carriers relative to total industry productivity gains measured on the same basis, this would raise such issues as the extent of our legal authority to force individual carriers to become significantly more efficient, and whether and how we might determine productivity factors for each carrier or for categories of carriers with similar productivity characteristics.

311 See Stekler, Measures for Evaluating Forecasts, in The Handbook of Economic and Financial Measures 496 (F. Fabozzi & H. Greefield eds. 1984) ("Most studies which evaluate multiperiod forecasts covering a span of quarters have examined this relationship between accuracy and the length of the forecast horizon. All the results quite clearly show that the mean absolute errors increase in proportion to the span of the forecast.' However, there is no consensus about the meaning of these results.") (footnote omitted).

174. Against this background, it is clear that consumers served by carriers electing price caps will not, as AT&T suggests, be worse off merely because such carriers "expect" to be able to achieve future productivity gains in excess of those established in the price cap formula. Under our proposal, customers of dominant carrier electing price cap regulation would continue to receive the benefit of the 2.5 percent annual productivity gain such carriers historically have achieved relative to the overall economy. Moreover, our proposal calls for a 0.5 percent "consumer productivity dividend" which would be added to the 2.5 percent productivity factor noted above. Application of the total 3.0 percent productivity adjustment to those electing price caps will, therefore, produce lower rates for consumers than likely would have been achieved if such carriers had remained subject to rate-of-return regulation. It also is worth noting that consumers benefit from this higher-than-average productivity adjustment in the first instance because it is applied to a carrier's rates at the beginning of a rate period. While a carrier may thereafter be able to boost its earnings by instituting efficiencies over and above the productivity adjustment, this should not obscure the fact that its rates already would be lower than they likely would have been under rate-of-return regulation, and that consumers would be enjoying the benefits of those lower rates.

175. We also do not agree with the assertion of some commenters that proceeding on an elective basis is imprudent because the total cost of regulation will increase as a result of having to maintain "dual" regulatory systems. These commenters fail to appreciate that price cap regulation is simpler and less costly to administer than rate-of-return regulation and, as a result, the burden of having to administer the two systems side-by-side likely will be incremental. We also note that any additional cost or inconvenience resulting from having to operate two regulatory systems is likely to be relatively brief, lasting only during the four-year period until completion of our general performance review of the entire price cap system.

176. We tentatively conclude that allowing carriers to elect price cap regulation initially is in the public interest. This step represents just another aspect of our cautious approach in implementing this alternative regulatory system. Specifically, it appears to provide a means of avoiding any unforeseen difficulties relating to carrier diversity without running a risk of harming the public interest. Our comprehensive performance review after three years of price cap regulaton would then put us in a better position to consider whether we should apply price caps to all dominant carriers. We seek comment on all of our tentative conclusions relating to making price cap regulation optional initially.

177. We also seek comment on an alternative proposal, pursuant to which we would make price cap regulation mandatory for AT&T and all Tier I LECs, and optional for the remaining eligible LECs. We do not favor this approach because it appears to sacrifice the benefits of proceeding cautiously. Commenters who address this alternative proposal are encouraged to address whether mandatory application is necessary to further the public

interest, and how mandatory application relates to the issue of carrier diversity.

ii. Pooling

178. In 1983, this Commission established the National Exchange Carrier Association (NECA) for the purposes of preparing tariffs and administering the process whereby LECs pool the costs and revenues associated with the provision of interstate access services.[312] Pools were established for both TS and NTS access elements, and all LECs were required to participate in the NTS pool. We took this action for two reasons. First, because we determined that pooling would support the maintenance of AT&T's nationwide averaged toll rate schedule.[313] Second, because most LECs had never filed any kind of interstate tariffs and needed a system in which they could share risks and the administrative costs of maintaining interstate tariffs. The NTS pool also has proven to be an effective vehicle for implementing other important public policies, such as the administration of the High Cost Fund and the Lifeline Assistance program.[314] Although we subsequently modified our rules to permit carriers to withdraw from the NTS pool beginning in 1989,

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312 This was accomplished as part of this Commission's efforts to establish a system of tariffed charges, commonly known as access charges, through which local exchange carriers recover most of their costs assigned to the interstate jurisdiction through the separations process. See MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241, 332-33 (1983)(Access Charge Order). Prior to the creation of NECA, most LECs recovered the bulk of their interstate revenue requirements through a pooling process administered by AT&T known as separations and division of revenues. See MTS and WATS Market Structure, Second Supplemental Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 224, 226-31 (1980).

313 See generally Section VI.A.3, infra (discussion of relationship between toll rate deaveraging and proposed price cap rules).

314 Pursuant to Part 36 of this Commission's Rules, the High Cost and Lifeline Assistance programs allocate additional amounts of NTS loop costs and service connection charges to the interstate jurisdiction in situations in which a LEC has higher than average loop costs or qualifies under a Commission-approved Lifeline Assistance program. These programs reduce the intrastate allocation of such costs and therefore keep local service rates lower than they otherwise would be. See MTS and WATS Market Structure, CC Docket Nos. 78-72 and 80-286, Report and Order, 2 FCC Rcd 2953 (1987) (Pooling Order).

we took pains to craft such modifications in a manner that does not threaten any of the policy goals underlying these programs.[315]

179. No commenter offers detailed suggestions about how price caps could be applied to the NTS or TS pools.[316] Indeed, it is not clear how the benefits of price cap regulation could be obtained in a pooled environment, which, by definition, entails the sharing of risks and the dampening of incentives to operate efficiently.[317] Obtaining the benefits of price cap regulation, therefore, would appear to require fundamental alterations to the purposes, structure and operation of the pools. However, we do not propose any such alterations herein because those suggesting that we apply price caps to the pools do not contemplate, and we have tentatively concluded that we should not here seek, fundamental pooling changes. The primary goal of this proceeding -- establishing regulatory methods that benefit consumers by promoting efficient dominant carrier operations -- responds to just one aspect of our mandate under the Communications Act to regulate in the public interest. This goal must give way when, as here, it appears to conflict with programs and policies developed over many years to further our goal of achieving universal service. We conclude, therefore, that our current pooling rules and procedures will not be altered by the policies proposed in this proceeding, and that we will continue to regulate such pools pursuant to traditional rate-of-return principles.

c. Common Line Access Element

180. The LECs' common line revenue requirement consists principally of the interstate portion of the cost of providing the local loop between an

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315 See Pooling Order.

316 NECA suggests that it and its member LECs be given the option to elect price cap or rate-of-return regulation, thus permitting them to "examine the pros and cons of price caps, cost-of-service regulation and combined approaches." NECA Reply at 2. Similar suggestions are advanced by other commenters. See NTCA Comments at 5; NYNEX Comments at Exhibit R; Centel Comments at 20. None of these commenters, however, identifies with particularity the precise mechanism for applying price caps in a pooled environment. For example, Taconic's suggestion that we treat NECA as a single, large carrier and cap its rates fails to describe the mechanism NECA would use to flow the results of price cap adjustments through to each carrier participating in its pool.

317 See Pooling Order, 2 FCC Rcd at 2933.

end user's premises and a telephone company's central office.[318] Although these costs are by nature non-traffic-sensitive (NTS), LECs recover a substantial portion of their common line revenue requirement from interexchange carriers on the basis of a charge per access minute of use known as the carrier common line (CCL) charge.[319] Other portions of a carrier's common line revenue requirement are recovered directly from end users through a surcharge on special access lines and a flat-rate charge, commonly known as the subscriber line charge, that telephone subscribers are assessed each month on a per-line basis.[320]

181. Since the advent of switched access charges in May 1984, the CCL charge has gradually decreased due to changes in the aggregate levels of carriers' common line revenue requirements and the manner in which such charges are collected.[321] This decrease has stimulated growth in the demand

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318 Common line revenue requirement also consists of expenses associated with certain non-loop costs, including those associated with public pay telephones, see 47 C.F.R. § 69.501, the amortization of embedded inside wire, see Amendment of Part 31, 85 FCC 2d 818, 828-29 (1981), and the amortization of depreciation reserve deficiencies, see Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, CC Docket No. 87-447, FCC 88-6, released Jan. 21, 1988 (Amortization Order).

319 See 47 C.F.R. § 69.105.

320 See 47 C.F.R. §§ 69.104, 69.115.

321 Since May 1984 the CCL charge has decreased from 5.24 cents per minute of use to a level of approximately 2.32 cents per minute on a weighted basis today. These reductions are the result of many factors, including the implementation of subscriber line charges, the phase-out of embedded costs of inside wiring and customer premises equipment, changes in authorized rates of return, the transition to a 25 percent factor for allocating loop costs between the interstate and intrastate jurisdictions, other separations changes, and certain actions by this Commission, such as the bifurcation of originating and terminating CCL rates, that affect the CCL charge. These decreases have been achieved despite other occurrences during this period that by themselves would have tended to increase the CCL charge, such as inflation, ordinary growth in the number of local loops, and the special access treatment of the closed ends of WATS lines ordered by this Commission in CC Docket No. 86-1. See generally MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Recommended Decision and Order, CC Docket Nos. 78-72 and 80-286, released Mar. 31, 1987, at paras. 1-54 (Recommended Decision).

for the LECs' switched access services, and we expect that the CCL charge will continue to decline and the demand for switched access will continue at robust levels for at least several years to come. This represents good news for consumers because it is this Commission's policy to require AT&T to flow through CCL reductions to consumers on a dollar-for-dollar basis in the form of lower rates for AT&T services.

182. This demand growth is also the source of AT&T's claim that the LECs' CCL charges should be capped separately and adjusted for growth in order to ensure that such rates decline with falling unit costs. Absent such actions, AT&T asserts, "prices could become unreasonable in relation to costs, and the CCL rates could provide excessive revenues to LECs ... without regard to whether the LECs were more efficient."[322] AT&T suggests that CCL rates should be capped and thereafter adjusted each year by the percentage increase in the number of switched access lines and a factor that reflects increased demand.[323] In their pleadings, several LECs dispute AT&T's analysis and contend that CCL charges should be neither capped separately nor subject to special growth adjustments because inflation and increased growth in the total number of access lines will offset growth in the demand for the LECs' switched access services.[324] Interested parties carried this debate forward after the close of the pleading cycle in a series of ex parte presentations to this Commission's staff.[325] Moreover, a study submitted by Bell Communications Research (BellCore) purports to demonstrate that application of the 2 percent productivity factor incorporated into USTA's proposed price cap formula would have secured lower rates for consumers than those actually achieved during 1984-88 under rate of return.[326]

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322 AT&T Reply at 50 n.**.

323 Id.

324 See, e.g., Ameritech Reply at 7.

325 See Letter from J. Farrell, Bell Atlantic, to Secretary, Federal Communications Comm'n, CC Docket No. 87-313 (Dec. 15, 1987); Letter from J. Farrell, Bell Atlantic, to Acting Secretary, Federal Communications Comm'n, CC Docket No. 87-313 (Jan. 14, 1988); Letter from G. Morlan, AT&T, to Acting Secretary, Federal Communications Comm'n, CC Docket No. 87-313 (Feb. 23, 1988); Letter from J. Farrell, Bell Atlantic, to Acting Secretary, Federal Communications Comm'n, CC Docket No. 87-313 (Mar. 8, 1988).

326 Bellcore Study at 37. A critique of the BellCore Study entitled "Analysis of Bell Communications Research March 17, 1988 Study Concerning the Impact of the LEC Price Cap Plan on Interstate Telecommunications Customers," which was prepared for the International Communications Association (ICA) by Economics and Technology, Inc. (ICA Study), also was submitted to this Commission by ICA on April 20, 1988. We note that data underlying the ICA

183. We note that the CCL charge is particularly sensitive to the level of demand because it is determined by dividing a revenue requirement which does not fluctuate with the level of demand by the total number of minutes of use. Thus, the marginal cost of providing another minute over the facilities included in the common line revenue requirement is zero, and increases in demand translate directly into decreases in the CCL charge. However, we also note that this sensitivity to the level of demand is a difference of degree rather than of kind relative to other charges. Because most telecommunications services apparently exhibit economies of scale, increases in demand generally decrease the average cost of providing service.

184. The very high rate of demand growth in the years since divestiture has been caused by the rapid price reductions associated with our access charge program and other regulatory changes.[327] The stimulation in demand due to price decreases caused by regulatory action has been explicitly considered in past access charge filings,[328] and has been passed on to consumers through lower CCL charges and correspondingly lower AT&T charges than would have existed in the absence of that stimulation. We tentatively propose to continue the consumer benefits of that policy by requiring that a CCL price reduction associated with demand stimulation caused by an exogenous revenue requirement decrease be treated as an exogenous price reduction. This tentative proposal would continue the present policy of requiring that the direct and indirect benefits associated with exogenous changes in regulatory requirements be passed on to consumers.

Study has not been entered into the record of this proceeding, and that the study does not contain a detailed explanation of the methodologies it employs. These factors make it difficult to evaluate the ICA Study. We encourage ICA to submit such materials, and we seek comment on the ICA Study and the BellCore Study.

327 Appendix C contains a record of these price reductions.

328 See, e.g., FCC Public Notice 3037, "Commission Specifies Procedures and Support Information for Tariff Filings to implement July 1 Increase in Subscriber Line Charge and Corresponding Reductions in Long Distance Rates," Apr. 30, 1987 (Commission directs NECA to flow through the full amount of both the Jul. 1, 1987 increase in subscriber line charges and the stimulation of usage which the resulting long distance rate reductions will generate; AT&T directed to flow through the full amount of CCL charge reduction and the stimulation of usage).

185. Separate and apart from this issue, we tentatively conclude that we will not apply price cap rules and procedures to the recovery of depooled LEC common line revenue requirement until July 1990. As noted previously, all LECs currently are required to participate in the common line pool administered by NECA. Working with the states through the Joint Board process, mandatory pooling requirements recently were modified to provide LECs an opportunity to withdraw from the NECA common line tariff and file their own common line tariffs with a scheduled effective date of April 1, 1989,[329] which is the same day we are proposing to implement price cap regulation. Proceeding with price cap implementation and common line depooling on the same schedule would require the use of untested, depooled common line rates to establish initial price cap indices, and might threaten the smooth implementation of depooling procedures. We tentatively conclude that using depooled common line rates that have been tested by a reasonable amount of operating experience will provide a more solid foundation for establishing such indices and will avoid any potential harm to the goals we seek to achieve through pooling modifications. Therefore, we propose to initiate price cap regulation for LECs' depooled traffic sensitive rates on April 1, 1989, and to broaden the reach of such regulation to include depooled common line rates as of July 1, 1990.

186. We note that computation of a price index for common line is complicated by the recovery of common line revenue requirement through a combination of end user charges and residual CCL charges. Because increases in end user charges are limited by operation of this Commission's Rules,[330] the total revenue from such charges will increase as the number of lines increases but will not change as a direct result of changes in the average cost per line. However, the total common line revenue requirement will increase as the number of lines increases and will also change as a direct result of changes in the average cost per line. Consequently, there is no simple relationship between the CCL charge and the average cost per line, or between changes in the CCL charge and the rate of productivity improvement per line. In order to establish a means of securing meaningful measurements of common line productivity, we propose to use a total common line rate per minute in the price cap index (PCI) formula (computed as if there were no end user charges) rather than using the CCL charge. This total common line rate per minute can be more clearly related to changes in demand, productivity, and inflation than can the CCL charge. We propose that carriers also be required to compute an end user charge per minute (i.e., total end user revenues divided by the same demand number used to compute common line

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329 See Pooling Order, 2 FCC Rcd at 2956, 2958-60; see also 47 C.F.R. § 69.3(e)(9).

330 47 C.F.R. § 69.203.

revenues per minute). The CCL charge would then be capped at the difference between the common line charge per minute and the end user charge per minute.

187. We tentatively conclude that our proposal to require that CCL charge reductions associated with demand stimulation caused by exogenous revenue changes be treated as exogenous, and our proposal to include the common line revenue per minute in the PCI formula (rather than the CCL), provide an adequate accommodation for the special characteristics of common line. We tentatively conclude that no special adjustment to our proposed productivity adjustment, which is discussed in Section V, infra, is necessary in connection with LEC price cap tariffs scheduled to become effective April 1, 1989 (which will not include common line revenue requirement), and that no further adjustment for common line will be required when price cap regulation is broadened to include common line revenue requirement in July 1990. We seek commment on our tentative conclusions. We seek further evidence and analysis regarding whether our proposal will adequately account for the special characteristics of common line. We seek comment on the question whether we need to adjust the productivity factor we propose to apply to LECs electing price cap regulation because of our proposed exclusion of common line from price cap regulation during the period from April 1989 through July 1990. In addition, we also seek comment on the question whether we need to adjust the productivity factor after common line is brought into price cap regulation at the conclusion of that period.

188. As an alternative to the above analysis, we propose to use an index of the price per line, rather than the price per minute, as the common line component of the PCI. Under this alternative, the base year per line revenue requirement would be adjusted by a price level factor, an appropriate productivity factor, and relevant exogenous factors outside the control of the carrier. This updated revenue requirement would then be multiplied by the expected number of access lines, and reduced by the expected revenues from subscriber line charges. The resulting revenue requirement could then be divided by the estimated number of access minutes to calculate the carrier common line charge. This process is close to the current process of annual review for non-traffic-sensitive costs, except the carriers would have the favorable economic incentives that stem from the application of a system of price caps to their costs. We seek comment on this alternative analysis. We seek comment on the relative merits of our two proposals. We seek comment on any and all alternative approaches to handling the relationship between demand growth and common line charges, including the legal and economic properties of all such alternative approaches.

III. LEGAL AUTHORITY

A. Summary of Notice

189. In the Notice, this Commission conducted a preliminary review of the Communications Act, its legislative history, and pertinent case law, and tentatively concluded that we are under no legal obligation to continue employing a rate-of-return methodology to ensure just and reasonable rates for customers of dominant carriers.[331] We determined instead that with an adequately developed administrative record we could replace rate-of-return regulation with another regulatory model, so long as that model produced rates within a "zone of reasonableness" that balanced investor and ratepayer interests.[332] We invited comment on our analysis.[333]

B. Pleadings

190. AT&T, all of the BOCs and major independent telephone companies, some states, and several other parties agree with the tentative conclusion contained in the Notice that there is no per se legal barrier to replacing rate-of-return regulation.[334] Many of these parties observe that the Communications Act mandates only that rates be "just and reasonable," and does not require a particular regulatory approach. In their view, properly defined price cap regulation would satisfy the Act's requirements.[335] In fact, some of these commenters note that in divorcing

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331 Notice, 2 FCC Rcd at 5211 (para. 20).

332 Id. at 5211-12 (paras. 20, 22).

333 Id. at 5212 (para. 23).

334 AT&T Comments at 4-5; Bell Atlantic Comments at 4; BellSouth Comments at 6-7; NYNEX Comments at 43; Pactel Comments at 7-8; US West Comments at 19-22; GTOC Reply at 15; USTA Reply at 8 n.13; Ameritech Reply at 6; NY EnerTel Comments at 13; Arizona Comments at 6; West Virginia Comments at 3. Centel implies that this Commission has a statutory obligation to replace rate-of-return regulation. Centel Comments at 7-8. Though the Kentucky PSC agrees that this Commission is not legally barred from abandoning the current system of regulation, it contends that our duty is to select the most appropriate regulatory scheme, which it believes to be rate-of-return regulation. Kentucky PSC Comments at 2.

335 E.g., AT&T Comments at 4-5; Bell Atlantic Comments at 8-9; US West Comments at 19-22.

rates from individual firm costs, the price cap plan is analogous to regulatory mechanisms used by other federal agencies operating under legislative constraints similar to our own.[336]

191. On the other hand, a few commenters, led by CFA, contend that the Communications Act compels this Commission to employ a rate-of-return methodology in regulating telecommunications common carriers.[337] In particular, several commenters suggest that the price cap approach proposed in the Notice would not withstand judicial scrutiny because it improperly divorces consideration of carrier costs and profits from carrier rates.[338] Several parties express concern that the proposal to accord streamlined tariff review treatment, including presumed lawfulness, to below-cap rates would unlawfully shift the burden of justifying rates away from the carrier in a proceeding under Section 204(a) of the Act, 47 U.S.C. § 204(a).[339] More generally, some commenters appear to view the price cap proposal outlined in the Notice as de facto deregulation prohibited by the Communications Act.[340]

192. Several commenters maintain that the price cap plan is a prescription of rates under Section 205(a) of the Communications Act, and argue that this Commission must therefore conduct a hearing to determine whether the proposed rates are just and reasonable.[341] Other parties disagree, however, contending that the price cap proposal is not a rate prescription since it does not dictate actual rates but merely establishes parameters for streamlined regulatory scrutiny.[342]

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336 NYNEX Comments at 45; Bell Atlantic Comments at 9; Pactel Comments at 12.

337 CFA Comments at 4-6; New Hampshire PUC Comments at 3-4; Ohio Reply at 2-5.

338 E.g., Cable & Wireless Comments at 3-6; Ad Hoc Comments at 15; CCTU Reply at 26-27; Networks Comments at 7; CFA Comments at 10.

339 NASUCA Reply at 4; Maryland PC Comments at 20-21; Citizens Reply at 2.

340 NTN Reply at 14. ALC asserts that the price cap plan is "deregulation below the cap and business as usual above the cap." ALC Comments at 22.

341 See, e.g., CCTU Reply at 4-7; NASUCA Reply at 4; Ad Hoc Comments at 10-11. Ad Hoc concedes, however, that the current record may be adequate to justify the prescription of a provisional interim price cap plan for AT&T. Ad Hoc Reply at 14-15.

342 AT&T Reply at 29-32; NYNEX Reply at 31; BellSouth Reply at 6-7; US

C. Discussion

-193. Having considered the pleadings regarding the Notice, we reiterate our initial tentative conclusion that we are not legally required to continue rate-of-return regulation of dominant carriers. Furthermore, we tentatively conclude that the Communications Act and relevant judicial precedent empower this Commission to address the demonstrated limitations of rate-of-return regulation with the modest, but important, reforms that we propose in this Further Notice.

194. The Communications Act mandates that rates for interstate telecommunications common carrier services be just, reasonable, and non-discriminatory.[343] However, while the statute requires that we "execute and enforce [its] provisions,"[344] and provides us with an array of regulatory powers, both specific and broad,[345] it does not compel this Commission to utilize a rate-of-return methodology or any other particular regulatory model in fulfilling our statutory obligations.[346] Rather, courts

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West Reply at 19-20.

343 47 U.S.C. §§ 201, 202.

344 47 U.S.C. § 151.

345 See n.6, supra.

346 In the Notice, 2 FCC Rcd at 5211 n.49 (para. 21), we traced the legislative history of the Communications Act of 1934 and concluded that in enacting that statute, Congress did not intend to mandate rate-of-return regulation. As we explained, in 1910 Congress enacted the Mann-Elkins Act, which placed interstate telephone and telegraph services under the supervision of the Interstate Commerce Commission. See Commerce Commission (Mann-Elkins) Act, Pub. L. No. 218, ch. 309, Section 7, 36 Stat. 544 (1910). During its regulatory tenure, the ICC never attempted to impose rate-of-return regulation upon carriers providing interstate communications services. See Loeb, The Communications Act Policy Toward Competition: A Failure To Communicate, 1978 Duke L. J. 1, 17 nn.82-83 (1978)("Loeb"). In 1934, President Roosevelt urged Congress to consolidate in a single agency the federal regulatory authority over telecommunications services, which was, at the time, allocated among the ICC, the Federal Radio Commission, and the Postmaster General. See Message to Congress, Feb. 26, 1934, reprinted in H.R. Rep. No. 1850, 73d Cong., 2d Sess. 1-2 (1934). The legislative history of the Communications Act suggests that this consolidation, rather than any intent to alter the manner of regulating the telecommunications industry, provided the principal impetus for the Act's passage. See H.R.

have consistently found in the Act a congressional intent to grant this Commission broad discretion in selecting regulatory tools.[347] Our "broad discretion" specifically includes "'selecting methods ... to make and oversee rates ....'"[348] In doing so, we may make any "'reasonable selection from the available alternatives.'"[349] Moreover, upon an appropriate administrative record we may amend existing regulatory methods to implement statutory objectives "either with or without a change in circumstances."[350]

195. A review of court decisions involving this Commission and other federal agencies with rate authority similar to our own confirms that, rather than insisting upon a single regulatory method for determining whether rates are just and reasonable, courts evaluate whether the end results of particular regulatory schemes produce rates that fall within a "zone of reasonableness."[351] For rates to fall within the zone of reasonableness, the agency rate order must constitute a "reasonable balancing" of the "investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates."[352] While costs often offer the principal points of

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Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934); Loeb at 26 & n.128. Although CFA asserts that in enacting the Communications Act Congress intended legislatively to prescribe rate-of-return regulation (CFA Comments at 4-8), CFA fails to cite any statutory provision or any passage from the Act's legislative history to support its position, or to rebut the legislative history discussed above.

347 See, e.g., Western Union Int'l v. FCC, 804 F.2d 1280, 1292 (D.C. Cir. 1986)("The FCC's judgment about the best regulatory tools to employ in a particular situation is ... entitled to considerable deference from the generalist judiciary.").

348 MCI Telecommunications v. FCC, 675 F.2d 408, 413 (D.C. Cir. 1982)(quoting Aeronautical Radio v. FCC, 642 F.2d 1221, 1228 (D.C. Cir. 1980), cert. denied, 451 U.S. 920 (1981)).

349 Id.

350 Greater Boston Television v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

351 See, e.g., FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979); AT&T v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988)(quoting Jersey Cent. Power & Light v. FERC, 810 F.2d 1168, 1177 (D.C. Cir. 1987)).

352 Jersey Cent. Power & Light v. FERC, 810 F.2d at 1177-78. See also FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979) (to fall within the

reference for determining whether rates are just and reasonable,[353] the zone of reasonableness standard does not require an agency "to adhere 'rigidly to a cost-based determination of rates, much less to one that bases each [carrier's] rates on his own costs.'"[354] Consistent with this well established case law, in many important respects this Commission does not rely solely on firm-specific costs in its current ratemaking scheme.[355] Similarly, this Commission has substantial discretion in the manner in which our rate regulation deals with carrier profits.[356] Ultimately, the substantive mandate under which we operate requires only that we select a reasonable ratemaking approach that is capable of keeping rates in the zone of reasonableness, or of detecting and correcting for the failure of market forces to do so.[357]

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zone of reasonableness, rates must be neither "less than compensatory" nor "excessive").

353 Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1502 (D.C. Cir. 1984), cert. denied, 469 U.S. 1034 (1984); MCI Telecommunications v. FCC, 675 F.2d 408, 410 (D.C. Cir. 1982).

354 FERC v. Pennzoil Producing, 439 U.S. at 517 (citation omitted); see also Permian Basin Area Rate Cases, 390 U.S. 747, 769, 797-98, 800-05 (1968), reh'g denied, Bass v. FPC, 392 U.S. 917 (upholding ratemaking based upon area-wide average costs); Farmers Union Cent. Exch. v. FERC, 734 F.2d at 1502-03 (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates).

355 For example, we permit average schedule carriers to establish rates based upon the estimated costs of a typical small company. 47 C.F.R. § 69.606. Similarly, current carrier common line charges are based upon pooling arrangements that do not reflect individual firm costs. 47 C.F.R. §§ 69.105, 69.501-69.502. In addition, we affirmatively preclude some rates from recovering the full cost of service, as is the case with subscriber line charges. See 47 C.F.R. §§ 69.104, 69.203.

356 See generally Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975)(upholding Commission's determination to initiate a system of prescribing carrier rates of return).

357 Farmers Union Cent. Exch. v. FERC, 734 F.2d at 1509. In Farmers Union, the court was reviewing a FERC decision to adopt a methodology for setting profit ceilings for oil pipeline operators. The formula permitted a range of allowable prices that would have been excessive "unless competition in the oil pipeline market dr[ove] the actual prices back down [to reasonable levels]." Id. The court held that the methodology was inconsistent with FERC's statutory mandate to ensure just and reasonable

196. In light of this precedent regarding our regulatory flexibility, we tentatively conclude that our price cap proposal, and the manner in which it takes account of carrier costs and profits, satisfies the Act's substantive requirement of ensuring just, reasonable, and non-discriminatory rates. The plan contains a number of elements, discussed in more detail elsewhere in this Further Notice, that lead us to this conclusion. First, the initial caps are based upon existing rates that have been filed and reviewed, and have gone into effect pursuant to our existing rate-of-return regulatory scheme.[358] Second, the plan's adjustment formula accounts for changes both in individual firm costs,[359] and in economy-wide and industry-wide costs.[360] Third, we intend to engage in continued monitoring of individual carrier cost data, and will undertake a comprehensive review of, among other things, the relationship between costs and rates beginning after three years. Finally, tariff investigations under Section 204 of the Act, and complaint proceedings under Section 208 of the Act, will continue to involve evaluation of a carrier's rates in light of its costs and profits. Thus, the proposed regime should operate to keep rates within the zone of reasonableness, and to detect and correct any unreasonable rates.[361]

197. In addition to concluding tentatively that our price cap proposal is consistent with the substantive mandate of the Communications

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rates, because "nothing in [the agency's] regulatory scheme itself act[ed] as a monitor to see if [competition in the market drove prices down] ... or to check rates if it [did] not." Id.

358 See generally Section IV.B.2, infra.

359 Individual firm cost adjustments include those related to changes in tax laws, the Separations Manual, the Uniform System of Accounts (USOA), Commission-prescribed recoveries of depreciation reserve deficiencies and inside wiring costs, and, for AT&T, access charges.

360 The formula's broader cost adjustments reflect changes in the carriers' costs of factors of production, as measured by the GNP-PI, and historical changes in telecommunications industry productivity. This reliance upon historical industry productivity data and inflation data to account for carrier costs is analogous to the Federal Power Commission's use of area-wide average natural gas producer costs in ratemaking, which the Supreme Court upheld in Permian Basin Rate Cases, 390 U.S. at 769, 797-98, 800-05.

361 See Farmers Union Cent. Exch. v. FERC, 734 F.2d at 1509.

Act that rates be just and reasonable, we also believe that our proposal "recognize[s] the careful accommodation of interests" reflected in the "procedures and limitations [of the Communications Act] concerning the ... processing of carrier initiated rate revisions."[362] Far from being a substantial deregulatory departure from existing practice, our proposal is moored to the statutory scheme. It represents, to a large extent, simply the considered exercise of our discretionary power regarding suspension of tariffs under Section 204 of the Act, 47 U.S.C. § 204, and of our authority to modify tariff filing procedures under Section 203 of the statute, 47 U.S.C. § 203. In most other respects, current regulatory procedures are maintained unchanged.[363] In this regard, we tentatively conclude that we have authority to establish the no-suspension and suspension zones proposed herein under Section 204, and to dispense with requirements regarding the filing of cost data with tariffs under Section 203.

198. It is well settled that a decision by this Commission to allow a tariff to become effective without suspension "is not an adjudication as to the lawfulness of tariff rates, but rather constitutes an exercise of the FCC's discretionary authority under section 204(a) of the Communications Act ...."[364] As such, "[t]hat exercise constitutes a

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362 AT&T v. FCC, 487 F.2d 865, 873 (2d Cir. 1973).

363 For example, aggrieved customers and competitors of carriers participating in the price cap system retain the right to challenge all rates under the procedures provided in Sections 204 and 208 of the Act, 47 U.S.C. §§ 204, 208. Carriers electing price cap regulation remain free, subject to the exercise of our suspension power, to file tariffs containing rates above the applicable caps and bands. Contrary to the contentions of some commenters, see Section III.B, supra, our proposal would not shift the burden of proof in a proceeding under Section 204(a) of the Act. As is presently the case, once this Commission determines to investigate a rate under Section 204, the carrier would have the burden of justifying its rates, based upon data regarding, inter alia, its costs and profits. Moreover, even if we do not initiate an investigation under Section 204, once rates become effective, parties are free to challenge them at any time pursuant to the Section 208 complaint process, and, again, a carrier's costs and profits would be at issue. As we stressed in the Notice, therefore, "we propose here no changes to the way we conduct investigations or the Section 208 complaint process." Notice, 2 FCC Rcd at 5215 (para. 41); see Section IV.D, infra. We also indicated in the Notice, and confirm here, our intention to fulfill our statutory obligation to guard against excessive carrier profits. Notice, 2 FCC Rcd at 5212, 5220 (paras. 22, 73).

364 American Broadcasting v. FCC, 682 F.2d 25, 30 (2d Cir. 1982).

preliminary decision within the Commission's exclusive discretion."[365] A concomitant of this discretionary suspension power is the authority to establish guidelines that express "a tentative opinion about the location of the line between the just and the unjust, the reasonable and the unreasonable."[366] Thus, courts have upheld the power of agencies to establish clearly delineated "no-suspension zones" as "an intelligent and practical exercise of [their] suspension power ...."[367]

199. It is also well established that this Commission has broad power under Section 203(b)(2) of the Communications Act, 47 U.S.C. § 203(b)(2), to adopt and modify the procedural rules related to the filing of tariffs.[368] Even in the absence of rules changes, courts have affirmed our power, and that of other agencies operating under cognate statutes, to waive procedural rules specifying the data that must be submitted in support of a tariff.[369] In the Competitive Carrier proceeding, for example, we exercised this authority to adopt rules permitting non-dominant carriers to file tariffs under streamlined procedures similar to those we propose here.[370]

200. Our price cap plan establishes a "no-suspension zone" for tariffs that propose rate level changes falling within applicable cap and band limits, and subjects such tariffs to streamlined filing and review procedures.[371] Above-cap or above-band filings, on the other hand, would

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365 Id. (citations omitted). Accord Aeronautical Radio v. FCC, 642 F.2d at 1234-35; Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 239-40 (D.C. Cir. 1980), cert. denied, 449 U.S. 1061 (1980). Cf. Southern Ry. v. Seaboard Milling, 442 U.S. 444, 458-59 (1979), reh'g denied, 444 U.S. 890 (ICC decision not to investigate rate increase held unreviewable).

366 Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 653 (1978).

367 Id.; see also Advanced Micro Devices v. CAB, 742 F.2d 1520, 1531 (D.C. Cir. 1984)(Advanced Micro Devices).

368 AT&T v. FCC, 503 F.2d 612, 613-14 (2d Cir. 1974).

369 See Aeronautical Radio v. FCC, 642 F.2d at 1235; American Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538-39 (1970).

370 See Competitive Carrier, First Report and Order, 85 FCC 2d 1 (1980).

371 This streamlined review applies to proposed rate level changes, which shall be presumed just, reasonable, and non-discriminatory for tariff review purposes if they fall within applicable cap and band constraints. As discussed in Sections IV and V, infra, these constraints are specifically designed to ensure that rate levels remain within a zone of reasonableness.

generally be suspended and, therefore, subject to full tariff scrutiny. The plan is, in these respects, similar to the Civil Aeronautics Board (CAB) tariff rules that were upheld in the 1984 District of Columbia Circuit decision in Advanced Micro Devices. That case, which effectively bridges the lines of cases defining just and reasonable rates, agency suspension power, and an agency's discretion to amend tariff filing procedures, involved a decision by the CAB to create a "no-suspension zone" for international cargo tariff filings. Under the agency's rules, which were issued under authority of a statute similar to ours, cargo rates falling within the established zone would not be suspended, except in "extraordinary circumstances."[372] CAB rules also eliminated the requirement for economic data to justify rate filings within the zone, and placed the burden on opponents of such rate changes to show "reasonable grounds" for investigating, or "extraordinary circumstances" for suspending, a new rate.[373] The court found these rules to be reasonable, and consistent with the agency's statutory obligation to ensure just, reasonable, and non-discriminatory cargo rates.[374]

Moreover, we have tentatively concluded that it is unlikely that rate level changes within these constraints would raise issues of unreasonable discrimination, making it unnecessary to forgo the benefits of streamlining specifically to protect against that risk. On the other hand, tariff filings that propose rate structure changes or terms and conditions changes will not be presumed lawful, shall not be accorded streamlined review, and must be filed on 45 days' notice. To the extent that a carrier proposes tariff revisions combining rate level changes with rate structure or terms and conditions changes, no portion of the filing will be accorded streamlined review or be presumed lawful, and the 45-day notice requirement shall apply. This approach ensures that proposed rate structure or terms and conditions changes, which may give rise to claims of unreasonable discrimination, can be scrutinized appropriately.

372 742 F.2d at 1533.

373 Id. at 1533-36.

374 Id. at 1531-37. The court found that "there is value in an agency articulating some suspension policy upon which the regulated industry can rely." Id. at 1531. The court stressed that the CAB (like this Commission in our proposal) retained the power to investigate, and if appropriate suspend, rates within the zone, upon its own motion or upon challenge by an opponent of the rate. Id. at 1532. In the court's view, the agency rationally "determined that it could accomplish its regulatory duties more efficiently by requiring cost data [from carriers] only when [within-zone] rates are challenged." Id. at 1536.

201. Like the procedures upheld in Advanced Micro Devices, our price cap proposal would establish a general "no-suspension zone" that "allows rates in the zone to go into effect without suspension in most circumstances," while retaining our power to "investigate the new rates [within the no-suspension zone] and [to] ... set them aside if found to be unjust, unreasonable or otherwise infirm."[375] As in that case, carriers would be "exempted ... from having to submit economic data to justify rate increases within the zone ..., although [we] retai[n] 'the power to require carriers to submit economic justifications on an ad hoc basis ....'"[376] Like the CAB's requirement that persons challenging rates within the zone establish "extraordinary circumstances" to justify suspension, we propose to require opponents to overcome the prima facie lawfulness, for tariff review purposes, of below-cap, within-band rates by showing that there is a high probability that the tariff rates would be found unlawful after investigation, that irreparable injury would result if the filing is not suspended, that suspension would not substantially harm other interested parties, and that the public interest would not be harmed by suspension.[377]

202. As in Advanced Micro Devices, we do not "expec[t a party] to produce information to which it has no access ..., [but we] simply requir[e] rate opponents to bring forward information to which they do have access in order to justify a rate inquiry."[378] Thus, the absence of cost support data in connection with tariff filings that propose rates within the no-suspension zone should not impede challenges, since opponents would not be required to establish an unreasonably high rate of return to sustain their burden regarding suspension. Rather, persuasive evidence of unlawfulness involving, for example, several rate increases in succession, discriminatorily high increases for certain services, or precipitous decreases having anticompetitive effect would suffice, at least to have this Commission require the filing carrier to come forward with a rate justification.[379] Such a procedure for regulating within-zone rates,

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375 Id. at 1532.

376 Id. (citation omitted).

377 Id. at 1533. In fact, the court in Advanced Micro Devices found the CAB's test to be "very similar to the standard for preliminary relief in ... Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)," a standard upon which our own proposal is based. Id. at 1533 n.7.

378 Id. at 1536.

379 Id. at 1534 & n.8. We believe, however, that our system of rate bands within the caps, combined with the price cap adjustment formula designed to

rationally designed to address appropriate statutory objectives, is within our power to adopt, and is consistent with the statutory burden on carriers to justify their rates in a Section 204 proceeding.[380]

203. We note that our general policy calling for suspension of above-cap and above-band rates would not preclude a carrier from convincing us, based upon appropriate cost data, that such a rate is just and reasonable. In the case of an above-cap filing, such a demonstration could be made upon a showing of "extraordinary" circumstances. In the case of an above-band filing, a carrier could avoid suspension upon a showing of "substantial cause," as defined in RCA American Communications,[381] for the proposed rate. Of course, even a suspended above-cap or above-band rate would be permitted to go into effect if, after "full scrutiny,"[382] it was found to be just and reasonable (or five months passed).[383]

204. Although we believe that the proposed reforms will ensure just and reasonable rates and advance the objectives of the Communications Act more effectively than rate-of-return regulation, we do not propose an affirmative prescription of just and reasonable rates in implementing price cap regulation. While some parties have argued that the success of price cap regulation depends upon prescription,[384] it is not obvious to us that this is the case. On the contrary, we tentatively conclude that such a course could delay implementation without any countervailing benefits. We

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account for productivity gains, should make discriminatory or continuous rate increases within the no-suspension zone very unlikely. Moreover, the caps and bands, along with continued enforcement of market rules, such as the prohibition against resale restrictions, should minimize the risk of predation. See Section IV.D.3.a.ii, infra.

380 Advanced Micro Devices, 742 F.2d at 1531, 1535-36.

381 86 FCC 2d 1197 (1981).

382 Notice, 2 FCC Rcd at 5214 (para. 40).

383 We also note here that our plan does not contemplate presumptive suspension of below-band filings, although it requires that such tariffs be accompanied by data demonstrating that the proposed rates will cover the costs of the service. As explained in Section IV.D, infra, below-band rates raise narrower competitive concerns that warrant different regulatory treatment.

384 See, e.g., Cable & Wireless Comments at 15-17; Maryland PC Comments, App. B at 1-5; Ad Hoc Comments at 8-13.

seek comment, particularly from those who argued that prescription is necessary to achieve the benefits of price cap regulation, regarding why such benefits cannot be achieved through our proposed no-suspension zone policy.

205. Several of the parties who support prescription are not precise as to what we should prescribe (e.g., individual rates, aggregate rate levels, caps, bands), or what procedures and data we would be legally required to employ in order to prescribe. To the extent that any commenters still believe that prescription is a prerequisite to the success of price cap regulation, we request that they address these issues in a detailed manner.

206. With respect to arguments that we have in fact prescribed rates, it is true that "whether [an] agency has prescribed a rate must be determined by looking at the practical consequences of its actions,"[385] and not just its assertion that it has not issued a prescription. Were we to prescribe rates, we concededly would need to follow the procedural requirements of Section 205(a) of the Act, 47 U.S.C. § 205(a), including the requirement that we provide "full opportunity for hearing ...."[386] However, contrary to the contentions of some commenters, our proposed price cap plan is not effectively prescribing rates without complying with the statute's procedural requirements.[387] Our establishment of a general suspension zone for above-cap and above-band filings does not "proclai[m] that a certain situation ... is unlawful and shall not occur," and therefore does not constitute a prescription.[388] Rather, under our interim proposal,

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385 Nader v. FCC, 520 F.2d at 199 (citation omitted). See also AT&T v. FCC, 487 F.2d at 874 (whether agency has prescribed depends upon impact of action rather than form).

386 AT&T v. FCC, 487 F.2d at 874. Of course, the "hearing" required by Section 205(a) need not in all cases be an evidentiary or trial-type proceeding. AT&T v. FCC, 572 F.2d 17, 22 (2d Cir. 1978), cert. denied, 439 U.S. 875 (1978). Depending upon "'the requirements of the particular case,'" notice and comment procedures may suffice. Id. (citations omitted).

387 See Section II.B, supra.

388 New England Tel. & Tel. v. FCC, 826 F.2d 1101, 1106 (D.C. Cir. 1987), pet. for reh'g pending (emphasis in original). See also Direct Marketing Ass'n v. FCC, 772 F.2d 966, 971 (D.C. Cir. 1985)("In practice, an agency statement has not been found to be a prescription absent explicit language that nonconforming tariffs will be rejected, combined with an agency motive to avoid public scrutiny and perhaps even judicial review."). Even to the extent that the statement in Direct Marketing that "the threat

carriers may file any rate they choose, recognizing that the applicable caps and bands constitute this Commission's "tentative opinion about the location of the line" between reasonable and unreasonable rates for the purpose of exercising our suspension power.[389] The price cap plan only affects the procedural treatment of various tariff filings, i.e., whether they are presumptively suspended or not, and does not determine whether particular rates are just, reasonable, and non-discriminatory.

207. Finally, we reiterate that our proposed regulatory reform is narrowly drawn to address the shortcomings of rate-of-return regulation demonstrated in this Further Notice. We tentatively conclude that our proposal will better serve our statutory objectives than traditional regulation has. Nevertheless, because we are charting a new course in our regulation of dominant carriers, our tentative decisions are necessarily "'of a judgmental or predictive nature.'"[390] Thus, we have crafted a program that is, at this point, voluntary, and which we plan to review in a comprehensive manner after three years. In addition, we retain the regulatory machinery to monitor the performance of carriers operating under price caps and intend to engage in such monitoring. We believe the Communications Act fully empowers this Commission to proceed in this cautious manner.

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that the agency will suspend nonconforming tariffs" may constitute a prescription is interpreted in a contradictory manner, id., there would still be no prescription here because of the lack of any motive or attempt by this Commission to avoid public scrutiny or involvement in the process. See id.

389 Trans Alaska Pipeline Rate Cases, 436 U.S. at 653.

390 United States v. FCC, 652 F.2d at 93 (citations omitted).

IV. PRICE CAP IMPLEMENTATION

A. Overview

208. In the preceding paragraphs we have explored perceived limitations in rate-of-return regulation and tentatively concluded that it does not represent optimum regulation. As we stated, the price cap methodology appears to offset many of the deficiencies in rate-of-return regulation and to provide additional benefits to carriers, ratepayers, and society as a whole. It therefore promises to be an improvement over our existing system. We have tentatively found that price caps would provide a better way of regulating both AT&T, an interexchange carrier subject to competition, and the LECs, for the most part still monopoly providers of local service.

209. As we foresaw in the Notice,[391] numerous technical issues must be resolved before price caps can be implemented. Whether caps should apply to all services, including existing, new, and restructured services, how they should be set initially, whether they should be broadly or narrowly defined, and their effect on a carrier's ability to engage in predatory conduct are among the threshold implementation issues presented. We must also resolve the effect our "no-suspension" policy for below-cap rates will have on tariff review procedures and other regulatory requirements. Finally, we must decide what factors must be used to adjust price caps so that rates within the cap limits continue to remain inside the zone of reasonableness and what our adjustment mechanisms will be. In the ensuing sections, we discuss these issues in detail.

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391 Notice, 2 FCC Rcd at 5214 (para. 37).

B. Initiating Price Cap Regulation

1. Services Subject to Price Caps

a. Summary of Notice

210. In the Notice, we tentatively concluded that at the outset, all existing services offered by dominant carriers, as well as new and restructured services, should be subject to price caps.[392] We reasoned that this approach, although perhaps more cautious than necessary, would maximize consumer protection against unreasonably high rates and, particularly in the case of existing services, have the advantage of administrative simplicity and efficiency.[393] We tentatively decided to postpone the question of designating a set of "core" services subject to price caps and chosen so that every service over which a carrier has market power would either be in the core or have a substitute therein, thus permitting "non-core" services to be offered outside of the cap.[394] We also recognized that capping new or restructured services could prove to be a substantially more difficult and complex task than that of capping existing services.[395] We noted that there were practical and policy questions associated with restructuring services under a cap regime.[396] In the ensuing section, we elaborate on these tentative conclusions, and seek further comment regarding our more detailed proposals.

b. Pleadings

211. Commenters are divided regarding whether price caps should initially be applied to all of a carrier's existing regulated services, or whether some services should remain uncapped. AT&T asserts that if this Commission adopts price cap regulation, all of AT&T's existing regulated services -- except those now accorded streamlined treatment or held out separately for ratemaking purposes[397] -- should be capped at the outset of

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392 Notice, 2 FCC Rcd at 5216-17 (paras. 52-54).

393 Id. at 5216-17 (para. 52).

394 Id. at 5217 (para. 55).

395 Id. (paras. 53-54).

396 Id. (para. 54).

397 These services include international non-IMTS, Accunet Packet Service, Defense Commercial Telecommunications Network Service, and Tariff No. 11 Local Channel Service. AT&T Comments, App. G at 1.

the new regulatory regime.[398] According to AT&T, a cap on basic MTS and MTS-like services would serve to protect small customers, while imposition of a single cap on all other services would streamline regulatory treatment of assertedly competitive interexchange services.[399] However, the carrier urges this Commission to institute further proceedings to determine which of the initially capped services are subject to sufficient competition to warrant even less intrusive regulatory oversight.[400]

212. Most commenting LECs contend that initially all non-pooled interstate access services should be capped.[401] These carriers maintain that such an approach would simplify administration of the new regulatory system, prevent delays in implementation, and provide the greatest protection for ratepayers.[402] On the other hand, two LECs argue, both as to AT&T and the LECs, that only those services for which there are limited competitive alternatives should be capped; competitive services, they contend, should be freed of direct pricing constraints.[403] Thus, it is proposed that of AT&T's offerings only standard MTS service need be capped,[404] and that among LEC offerings, special access services[405] and, possibly, subscriber line charges (SLCs) for multi-line business customers[406] could be removed from direct price controls.

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398 Id. at 47-50, 74-75.

399 Id. at 47-50.

400 Id. at 74-75.

401 E.g., Ameritech Comments at 19, 36; BellSouth Comments at 18-20, 41-42; SWB Comments at 2; NYNEX Comments at 27-28; United Comments at 15, App. A at 1; USTA Reply at 18-29. Accord Bell Atlantic Rules Submission, Attachment A at 6; NYNEX Rules Submission, Attachment (Part I) at 3; USTA Rules Submission, Attachment A at 3. A few carriers would also explicitly include CCL revenue requirements, as measured under existing rate-of-return procedures, in the initial price cap prior to depooling. E.g., SNET Comments at 8, 13.

402 E.g., United Comments, App. A at 1; Contel Comments at 12.

403 Rochester Comments at 3-4; GTOC Comments at 11-15.

404 GTOC Comments at 13.

405 Rochester Comments at 4; GTOC Comments at 13.

406 Rochester Comments at 4.

213. McCaw and Telocator express concern about the effect of price caps on tariffs embodying interconnection agreements between a LEC and a non-wireline mobile service provider. They argue that application of caps to such tariffs would violate the Sierra-Mobile doctrine[407] and would undermine this Commission's stated policy that such agreements should be bilaterally negotiated in good faith and should be cost-based.[408] They object to USTA's proposed application of price caps to "[a]ll tariffed access services of a telephone company," on the ground that this would include tariffs embodying such agreements.[409]

214. Most other commenters support applying price caps to all regulated services at the outset.[410] In this connection, Ad Hoc argues that the transition to a price cap regime would be fraught with enough pitfalls so that one more obstacle should not be added.[411] However, a cross-section of parties expresses dissenting views.[412] For example, the

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407 FPC v. Sierra Pacific Power, 350 U.S. 348 (1956); United Gas Pipe Line v. Mobile Gas Service, 350 U.S. 332 (1956).

408 Telocator Reply at 2-4; McCaw Reply at 3, 5-8.

409 Telocator Rules Reply at 2; McCaw Rules Reply at 2.

410 E.g., Comptel Comments at 23; Western Union Comments at 8; Cable & Wireless Comments at 12; Ad Hoc Comments at 18 & n.8; EDS Comments at 12; TCA Reply at 6; CCTU Reply at 22-23; Illinois Comments at 16; Alabama PSC Comments at 3, 5; West Virginia Comments at 7; Maryland PC Comments at 14-15; Michigan PSC Comments at 18. Accord API Rules Submission, App. at 1; MCI Rules Submission, Attachment at 1. Cf. GECS Reply at 5-7 (suggesting that price caps should be applied to competitive services, while rate-of-return regulation should be retained for services without competitive alternatives).

411 Ad Hoc Comments at 19.

412 US Sprint Comments at 12, 27 (proposing that AT&T's private line services be freed of direct price regulation); IBM Comments at 5 (proposing that competitive services be deregulated); GSA Comments at 8 (price caps should exempt competitively procured telecommunications services under contract); DOJ Reply at 23 (all AT&T services, except 800 Service and service to certain international interexchange markets, should be deregulated or subjected to streamlined regulation rather than price caps); NY EnerTel Comments at 26 (prices for AT&T's competitive offerings,

Department of Justice states that even if price cap regulation is determined to be better than rate-of-return regulation, price cap regulation should not be imposed unless its net benefits also exceed those of deregulation or streamlined regulation.[413] MCI, on the other hand, objects to including AT&T's Tariff 12 services under the cap because these filings raise cross-subsidization and discrimination issues, and "capping" each such specialized offering would be a meaningless exercise.[414] MCI objects to AT&T's "Tariff 12 strategy" and would require abandonment of such "objectionable practices" before implementation of price caps.[415]

215. Several of the parties supporting an initial across-the-board application of price caps argue that any attempt to exempt certain services would require a finding that those services were competitive,[416] a process that, they claim, would involve difficult factual and definitional judgments better suited to a separate proceeding.[417] The Illinois Commerce Commission also warns that applying price caps on a service-by-service basis while exempting some services totally from regulation may revive incentives to cross-subsidize.[418] Illinois argues that a firm which is partially deregulated has the incentive to subsidize competitive services with earnings from regulated services, a flaw it claims would be intensified under service-by-service[419] deregulation.

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including private line, Local Area Network Service (LANS), and computer hardware, should be left to the market).

413 DOJ Reply at 23.

414 MCI Comments at 11-14.

415 Id. at 14.

416 EDS Comments at 12; Illinois Comments at 16-17.

417 EDS Comments at 12; TCA Comments at 5; Illinois Comments at 16-17.

418 Illinois Comments at 17-18.

419 Id.

216. Commenters express wide-ranging views on whether "new services"[420] should be capped under price cap regulation. AT&T,[421] several LECs,[422] and a number of other parties[423] oppose bringing new services within price cap restrictions so long as existing capped services are not discontinued. These parties contend that capping new services is unnecessary, since existing, substitutable services would remain available on a capped basis[424] and since, in any event, competitors responding with their own offerings would drive the prices of the new services toward costs.[425] They continue that, in fact, capping new services would be

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420 Commenters appear to hold differing views regarding the proper definition of a "new" service. Comptel, for example, asserts that this Commission should treat as "new" only those services that offer customers technical functions and capabilities not provided through existing tariff offerings. Comptel Comments at 16. UTC concurs in Comptel's narrow definition, and warns that this Commission should clarify the definition of "new" services to avoid confusion, since, in its view, renamed or restructured services should be treated differently from "new" ones. UTC Reply at 6. Accord MCI Reply at 35; CCIA Reply at 12. On the other hand, AT&T appears to advocate a broader definition of "new" services, stating merely that offerings should be considered "new" regardless of their cross-elasticity with existing services. AT&T Comments at 51 n.**; see AT&T Rules Submission, Attachment A at 2. NYNEX proposes to divide "new" services into four categories, each to receive differing regulatory treatment: (1) alternative tariffs for existing services; (2) pure vertical services (new optional features added to existing offerings); (3) a wholly new service that is a competitive response; and (4) a wholly new service subject to no competitive alternative. NYNEX Comments at 34-35.

421 AT&T Comments at 50-51, App. C at 3 (testimony of Baumol and Willig); AT&T Reply at 25.

422 Bell Atlantic Comments, Attachment I at 3 & n.1; BellSouth Comments at 35; GTOC Comments at 32; Contel Comments at 13; Centel Comments at 10; United Comments, App. A at 1-2; SNET Comments at 13; see GTOC Rules Submission, App. A at 3, 6-8.

423 CCIA Reply at 12; DOJ Reply at 21; NTIA Reply at 16; Florida PSC Comments at 6.

424 AT&T Comments, App. C at 3 (testimony of Baumol and Willig); United Comments, App. A at 1-2.

425 AT&T Comments at 51; AT&T Reply at 25; BellSouth Comments at 35. See

harmful, because it would undercut the incentive to innovate generated by the possibility of large short-term profits,[426] and because efforts to establish, and to incorporate into the cap, appropriate price and demand figures for new offerings would significantly increase the complexity of price cap regulation.[427] Most BOCs propose that this Commission allow carriers to offer new services outside the cap initially, and then require them to bring those offerings into the cap after some period so that price and demand data based upon actual experience can be utilized in recalculating cap levels.[428]

217. Most remaining commenters, including OCCs, users, and states, contend that prices for new services should be capped from the outset.[429] At least one commenter asserts that immediate capping is a legal

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also Centel Comments at 10 (caps on new services are unnecessary because such services are generally of a discretionary and competitive nature, such as cellular telephone service).

426 AT&T Comments at 50; AT&T Reply at 25; Contel Comments at 13; Centel Comments at 10; SNET Comments at 13; NTIA Reply at 16; Florida PSC Comments at 6. Cf. DOJ Reply at 21 (opposing caps for new services and asserting that the economic cost of incorrectly identifying a competitive service as a monopoly service could be substantial).

427 AT&T Comments at 51 n.**; Contel Comments at 13.

428 E.g., Ameritech Comments at 20 n.16; Ameritech Reply at 40 (proposing that new services be included in the cap at the next annual adjustment following introduction of the service); SWB Comments at 32-33 (proposing that new services be included in the cap, based upon forecasted demand, at the next annual adjustment following introduction); Pactel Reply at 6 (proposing that new services be included in the cap at the next annual adjustment following six months of actual experience); USTA Reply at i, 19 (proposing that new services be included in the cap at the next annual adjustment following one year of actual experience); see USTA Rules Submission, Attachment A at 6. Cf. US West Comments at 42-43 (proposing that new services be subject to interim pricing rules outside the cap for three years and then brought within the aggregate cap).

429 MCI Reply at 34-36; MCI Rules Submission, Attachment at 1-2; Comptel Comments at iv; Western Union Comments at 8; Ad Hoc Reply, ETI Report at 43; UTC Reply at 5; GSA Comments at 9; New York DPS Comments at 13; West Virginia Comments at 7-8. Cf. NTN Reply at 16 (observing that capping new services creates difficult administrative problems for a price cap approach, but warning that AT&T and the LECs must not be permitted to price new services with unrestricted discretion outside the cap).

requirement in the absence of a demonstration that the service is fully competitive, since this Commission is not empowered to deregulate the offerings of dominant carriers.[430] Other supporters of immediate capping assert that calculating initial adjustments to cap levels based upon forecasted demand is administratively feasible, and any inaccurate demand estimates can easily be corrected based upon actual experience at the time of annual review.[431] In addition, several parties suggest that capping new services will discourage carriers from effectively deregulating themselves by manipulating demand between cross-elastic capped and uncapped offerings.[432] For example, MCI argues that by defining a series of "new" services substitutable for existing services (such as "Pro America IV, V and VI" for MTS), AT&T could migrate existing customers to new rate schedules outside the regulatory process.[433]

218. Most commenters addressing the issue of rate restructuring contend that it should be permitted, but made subject to safeguards. Several of these parties argue that rate restructuring should be given full regulatory scrutiny rather than streamlined treatment.[434] On the other hand, BellSouth contends that rate restructurings should have no effect on an aggregate price cap and should be given routine streamlined regulatory treatment.[435] BellSouth argues that since switched and special access services are increasingly cross-elastic, anything less than total aggregation "may create administrative and customer concerns with restructuring."[436] BellSouth contends that LECs should be encouraged to

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430 TCA Comments at 7.

431 GSA Comments at 9-10; Ad Hoc Reply, ETI Report at 43-44.

432 MCI Reply at 33-35; Comptel Reply at 14; TCA Reply at 10.

433 MCI Reply at 34 n.24.

434 E.g., USTA Reply, Attachment A at 16 ("A rate restructuring, which would involve the withdrawal or discontinuance of an existing tariff, would be subject to full Commission scrutiny."); MCI Comments at 26 (restructured rates should be subject to full regulatory scrutiny and 45 days' notice); Ad Hoc Reply, ETI Report at 43-44 (rate restructuring should be subject to full scrutiny and 90 days' notice).

435 BellSouth Comments at 36-37.

436 Id. at 36-37.

restructure services to better meet customer needs, and it notes that any concerns regarding rate discrimination, unreasonable charges, or endangerment of universal service can be handled adequately through the complaint process or similar measures.[437] Conversely, Cable & Wireless asserts that no rate restructuring should be permitted under its proposed prescription of cap levels, at least during the initial review period.[438]

219. None of the commenting parties explicitly endorses the concept of using capped "core" services as a means of placing competitive pressure on uncapped "non-core" services, although, as we have noted, several parties contend that it is unnecessary to cap new services or existing services for which there are competitive alternatives. Those commenters directly addressing the "core" services concept oppose its adoption, arguing that it would be difficult accurately to define the core and non-core baskets in terms of service substitutability,[439] and that adoption of the model could lead to cross-subsidization[440] and strategic pricing.[441]

c. Discussion

220. Our decision regarding which services to subject to caps will determine, for those carriers electing it, the breadth of price cap regulation. We could of course choose other regulatory alternatives for certain services. We might decide to afford a service greater regulatory flexibility than that available under caps, where, for example, competitive alternatives sufficiently guaranteed adequate protection to ratepayers. We might also decide to continue more traditional regulatory scrutiny of certain services, possibly on a temporary basis, where this would further the goals of this proceeding. We seek to formulate an approach which serves our primary objective of protecting ratepayers in the most administratively efficient way, while at the same time permitting sufficient carrier flexibility so that incentives to increase efficiency and innovation are

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437 Id. at 37.

438 Cable & Wireless Comments at 18-19.

439 Comptel Comments at 24; CCTU Reply at 23-24.

440 Ad Hoc Comments at 18; UTC Comments at 10-11; CCTU Reply at 24. See also API Comments at 17 (asserting that any attempt to define core services would raise problems associated with aggregate price caps).

441 Ad Hoc Comments, ETI Report, App. B at 5; UTC Comments at 9-11; CCTU Reply at 24.

maximized.

221. In light of these policies, we tentatively select an all-inclusive approach to capping existing services as a way to insure that consumer protection from potential abuses of market power is comprehensive. However, we recognize that certain categories of services present competing considerations. In the particular instances specified below, we propose to continue existing regulatory treatment of such services, at least on a temporary basis.

222. We propose to cap all existing services of AT&T, with the exception of services now subject to separate accounting requirements, and with the exception of AT&T's Tariff 5 special construction services and Tariff 12 custom-designed services.[442] In imposing such accounting requirements we had concerns, inter alia, that other regulated services not improperly subsidize these offerings. For this among other reasons (which we discuss below) we propose to continue to require separate accounting and reporting for those services now subject to such requirements, and to apply conventional 45-day tariff notice and existing tariff review standards,[443]

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442 These services include Accunet Packet Switching, Skynet KU, Non-IMTS, Tariff 5 services and Tariff 12 Services, including Special Routing Arrangement Service (SRAS), Defense Commercial Telecommunications Network (DCTN), Digital Tandem Switched Network and Arrangements (DTSN), and Virtual Telecommunications Network Service (VTNS). See, e.g., AT&T Communications, Transmittal No. 474, Mimeo No. 3264 (Mar. 25, 1986); AT&T Communications, Transmittal No. 581, Mimeo No. 4620 (May 20, 1986), review denied, 2 FCC Rcd 444 (1987); AT&T Accounting and Cost Allocation Plan, CC Docket No. 85-107, Mimeo No. 7222 (Oct. 2, 1986); AT&T Communications, Transmittal No. 425, Mimeo No. 3502 (Apr. 3, 1986); AT&T Communications, Transmittal Nos. 895 and 961, 2 FCC Rcd 5493 (1987) (August 19 Order), issues designated, AT&T Communications, Transmittal Nos. 895 and 961, 2 FCC Rcd 7389 (1987) (December 14 Order); AT&T Communications, Transmittal Nos. 1018 and 1102, 3 FCC Rcd 995 (1988) (February 9 Order); AT&T Communications, Transmittal No. 1145, CC Docket No. 87-568, DA 88-632 (released Apr. 28, 1988) (April 28 Order). We do not mean to include within the exception services subject to accounting orders merely as part of an ongoing tariff investigation. Rather, we intend to include within the exception those services subject to below-the-line accounting treatment.

443 These services of course are subject to the outcome of pending investigations and of a pending petition for declaratory ruling concerning AT&T Tariff 12 services. See, e.g., December 14 Order; AT&T Petition for Declaratory Ruling on Standards Applicable to Custom Service Tariffs, filed Feb. 17, 1988; Public Notice, "AT&T Communications Files Petition for Declaratory Ruling Regarding Custom Service Tariff Offerings: Pleading

to proposed tariff revisions of these services. For AT&T Tariff 12 services, most of which are currently subject to separate accounting requirements, and for special construction services, we believe that additional considerations, as described below, warrant exceptional treatment. In holding these services out of the aggregate cap, we would not include revenue or losses derived from them in the carrier's periodic performance review. We would thereby insure that shareholders and not ratepayers bear the risk of any losses from such services.

223. For the LECs we propose to cap all non-pooled services, excluding common line, Individual Case Basis (ICB)[444], and special construction tariffs. As we have explained in Section II, supra, proceeding with price cap implementation and common line depooling on the same schedule would require the use of untested, depooled rates to establish initial price cap indices. We therefore propose to continue existing rate-of-return regulation of common line, until 1990, when depooled common line rates will have been tested through one annual cycle.

224. We also tentatively propose to hold out of the cap certain individualized offerings for which particularized, conventional tariff review scrutiny appears appropriate and "capping" prices largely unnecessary. Both AT&T Tariff 12 services and LEC ICB tariffs[445] involve individualized pricing and often long-term arrangements. Given their guarantee of price stability,[446] if such services were included under the

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Cycle Established," 3 FCC Rcd 1117 (1988).

444 ICB tariffs are tariffs developed based on the circumstances presented in a particular case. This Commission originally permitted LECs to offer ICBs on the theory that they applied to service elements not previously offered, so that it would take some time to develop general rates for such services. See Investigation of Access and Divestiture-Related Tariffs, 97 FCC 2d 1082, 1143 (1984), subsequent order, 101 FCC 2d 911 (1985).

445 AT&T Tariff 12 services are long-term, custom-designed offerings. See, e.g., February 9 Order, 3 FCC Rcd at 995, 998. ICBs involve rates and charges, and if applicable, regulations developed based on the circumstances in a particular case. See, e.g., GTE Telephone Operating Companies, Tariff F.C.C. No. 1, § 2.6 (definition of "Individual Case Basis"). They often, although not exclusively, are long-term in nature. See, e.g., Ameritech Transmittal No. 172 (minimum period 36 months) (made subject to ongoing investigation in CC Docket No. 88-136, GTE Telephone Operating Companies, et al., DA 88-646 (released Apr. 28, 1988)).

446 See generally MCI Comments at 12.

cap, a carrier would be able to employ unused, permissible increases for such services to increase the rates of other services.[447] We also tentatively agree with MCI's argument that capping discrete, individualized offerings is unnecessary.[448] "Capping" such services would appear to be superfluous, since their price by definition is frozen for a significant period of time.

225. In addition, Tariff 12 services may raise cross-subsidization, discrimination and other concerns,[449] and ICB tariffs may raise significant discrimination issues[450] of the sort which our proposed price cap approach does not purport to streamline.[451] We tentatively discern no important administrative or policy gains from applying caps to these services, which for the most part generate issues beyond pure rate level questions. We thus believe that holding these services out of the cap, and applying conventional as opposed to streamlined tariff review scrutiny to them, would better further our goal of protecting consumer welfare.

226. MCI argues that we must first resolve issues of discrimination, adherence to our ban on resale restrictions, anti-competitiveness, and cross-subsidization generated by Tariff 12 filings before implementing price caps.[452] We are, however, by means of pending investigations[453] in the process of resolving expeditiously these very

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447 See generally Section V.B, infra.

448 MCI Comments at 14.

449 See, e.g., August 19 Order, 2 FCC Rcd at 5498; December 14 Order, 2 FCC Rcd at 7390-92.

450 See Bell Atlantic Telephone Companies, Revisions to Tariff F.C.C. No. 1, Transmittal Nos. 224 and 226, DA 88-314 (Mar. 8, 1988), recon. pending; Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, DA 88-424, (Mar. 28, 1988) (ICB Designation Order).

451 For a discussion of discrimination claims arising from a change in rate structure or in tariff terms and conditions, see supra, Section III.

452 MCI Comments at 2, 5-6.

453 See, e.g., December 14 Order, 2 FCC Rcd at 7390-92; February 9 Order, 3 FCC Rcd at 998-99; April 28 Order at para. 11.

issues. As we explain infra,[454] our price cap proposal is capable of adjusting for the results of pending investigations. Moreover, under our proposal these services are being held out of the cap and subjected to separate accounting treatment, thus alleviating concerns over improper cross-subsidization.

227. Special construction tariffs, offered by both the LECs and AT&T, are a third category of individualized offerings which appear to merit special treatment. These tariffs typically involve either long-term offerings (with a fixed customer termination liability)[455] or a one-time non-recurring charge.[456] In the former instance, "capping" a long-term rate, as in the case of Tariff 12 services and many ICBs, appears to be superfluous. In the latter instance, capping would also appear unnecessary, as it is improbable that such a particularized charge, largely determined by specific expenses incurred, would apply to more than one customer in more than one instance.

228. We tentatively decide that revenues from special construction services, as well as ICBs, be held separate from capped revenues for carrier performance review purposes and, that, along with common line revenues and all associated costs, continue to be subject to appropriate rate-of-return reporting requirements.

229. We seek comment on our proposal to continue existing regulation of AT&T and LEC services. We also seek the parties' views on whether we should alternatively consider bringing some or all of these services in at a future date, and if so, how we might satisfy our expressed concerns about the capping of such services.

230. We also clarify that the price cap plan which we propose affects only federally tariffed offerings. Contrary to the initial concerns of some mobile service interests, we do not intend to affect the principles applicable to bilaterally negotiated contracts between a LEC and a mobile service provider which we have previously enunciated.[457] We also note that

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454 See Sections IV.B.2 and V.B.3.C.vi, infra.

455 See, e.g., BellSouth Tariff F.C.C. No. 2, § 3.1 (giving expiration dates for "maximum termination liability periods" (MTLs)); AT&T Tariff F.C.C. No. 5, §§ 4.1, 6.3 (expiration dates for MTLs given).

456 See, e.g., BellSouth Tariff F.C.C. No. 2, Supplement No. 87-10 (examples of non-recurring charges (NRCs)); AT&T Tariff F.C.C. No. 5, § 5.18 and associated supplements (examples of NRCs).

457 See Radio Common Carriers (BOC Inquiry), 59 Rad. Reg. 2d 1275 (Pike &

the reforms which we propose herein have no apparent impact on the tariffs embodying such contracts, which tariffs as of this date have been filed at the local level.[458]

231. We tentatively decline at this point to adopt the suggestions of certain parties[459] that this Commission free assertedly competitive services from direct pricing constraints. Such an undertaking is beyond the scope of this rulemaking and would entail, as some parties suggest,[460] intricate factual and definitional judgments better suited to a separate proceeding. Moreover, we believe that attempting to undertake such a proceeding simultaneously with the implementation of price caps would complicate the transition to this new method of regulation. For similar reasons, we deem it advisable to postpone any consideration of designating a set of "core" services which could serve as an effective check on "non-core" services offered outside of the cap.

232. New and restructured services present special considerations due in large measure to the opportunity they present to carriers to charge rates that would otherwise not be permitted under our price cap rules. Unless the rules regarding new and restructured offerings are properly designed, carriers seeking to charge more than or less than our price cap regulations permit will be able to file new or restructured tariffs outside of price cap limitations in order to avoid these pricing restrictions.

233. The offering of a new, innovative service, or of a more efficient or marketable restructured service, potentially furthers our goal of increasing carrier innovation and cost-effectiveness and enhances the quality of service offered to consumers. These considerations motivate us to adopt a flexible approach to such services which keeps regulatory burdens on them to a minimum. As we recognized in the Notice,[461] however, these services potentially raise issues concerning endangerment of universal

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Fischer) (1986), clarified, Declaratory Ruling, The Need To Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd 2910 (1987).

458 See generally 59 Rad. Reg. 2d at 1284-85.

459 See AT&T Comments at 74; GTOC Comments at 11-15; Rochester Comments at 3-4; DOJ Reply at 6-22, 23; NTIA Comments at 3.

460 See EDS Comments at 12; TCA Comments at 5; Illinois Comments at 16-17.

461 See Notice, 2 FCC Rcd at 5217 (para. 54).

service, rate discrimination, and exorbitant charging, as well as potential anticompetitive concerns. In addition, our recent experience with certain new services demonstrates that these offerings can raise complex issues affecting both ratepayers and competitors. These competing considerations move us to scrutinize such offerings carefully. We also recognize, along with several parties, that there is a practical problem in setting a cap for a new service initially, because no historical demand exists by which to weight service prices.

234. In addition, to the extent new and restructured services can be offered outside of price caps, carriers will have an incentive to avoid the pricing limitations and market rules imposed upon them by price cap regulation. These concerns compel us to propose different tariffing requirements to discourage carriers from manipulating price cap regulation. We believe that new services, which represent an additional measure of choice for ratepayers, must be treated differently than restructured offerings, which do not expand ratepayer options and change or add a structure, term or condition.

235. We therefore propose to hold new services out of the cap for up to one annual tariff filing cycle, subject to separate accounting and quarterly reporting requirements,[462] and to tariff review procedures we will discuss in Section IV.D, infra. This would permit the carrier to develop historical demand figures for the service which can be used to integrate the service into the cap at the appropriate time in an expeditious manner. Given the relative brevity of the out-of-cap period and in light of the monitoring we will carry out during that time, opportunities to manipulate demand between capped and uncapped services, a possibility raised by several commenters, or to price unreasonably will be minimized. At the conclusion of the next annual adjustment cycle, a new service must be brought into the cap in accordance with the methodology described below.[463] This would ensure that, after a brief period of relative flexibility designed to stimulate carrier incentives to innovate, the consumer interest in affordable pricing would be achieved for the long run. In light of the lesser degree of competition existing in local exchange as opposed to interexchange service, however,[464] we believe that additional regulatory controls over both new

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462 We describe these requirements in detail in Section IV.D., infra.

463 See Section IV.D, infra.

464 See Section II.C.3.c, supra. See generally FCC News Release, "FCC Releases Report on Long Distance Carriers," Mimeo No. 2251 (Mar. 28, 1988), and accompanying Report (239 long distance carriers identified as purchasing equal access and 540 identified as purchasing switched access services); P. Huber, The Geodesic Network: 1987 Report on Competition in the Telephone

and restructured LEC offerings are necessary. We therefore propose to retain existing Part 69 requirements regarding rate structure, optional alternative carrier common line tariff provisions, and the rate relationships between premium and non-premium access services.[465]

236. If restructured services were also treated as outside the cap, carriers would have increased opportunity for manipulation of price cap requirements. So long as existing services could be "restructured" so as to avoid price cap limitations, carriers could effectively elect to leave price cap regulation at any time. We therefore tentatively find that services offered under price caps and subsequently restructured will continue to be subject to price cap requirements, pursuant to the methodology described below.[466] This ensures that ratepayers, who may have no close substitute for the restructured offering, will be protected from carrier migration away from price caps and the pricing and other limitations such regulation entails.

Industry at 2.12 (1987) (for LECs, "[s]erious competition to serve smaller users has not yet arrived ....").

465 See generally 47 C.F.R. §§ 69.4, 69.204, 69.205-69.207. See also Petitions for Waiver of Various Sections of Part 69 of the Commission's Rules, 51 Fed. Reg. 17093 (May 8, 1986), on reconsideration, 2 FCC Rcd 28 (1987); Petitions for Waiver of Various Sections of Part 69 of the Commission's Rules, 2 FCC Rcd 61 (1987).

466 See Section V.B.3.b.v, infra.

2. Setting Caps Initially

a. Summary of Notice

237. The Notice called for comment on the relative advantages and disadvantages of each of two possible means for setting caps initially.[467] On the one hand, the Notice proposed using existing rates as a "reasonable point of departure" for commencing a price cap regime, noting that this would be administratively simple and efficient.[468] Under this approach, refunds resulting from any pending investigations or complaint proceedings completed after implementation of price caps might be reflected in dollar-for-dollar adjustments to the caps. Two alternatives were suggested for refund obligations that remained outstanding after establishment of a price cap system: a direct refund or current bill adjustment for affected customers, or permanent or temporary modification to the cap.[469] On the other hand, the Notice suggested that general criteria might be developed both as a means for setting caps initially and as a general standard for setting capped rates for new or restructured services.[470] "Stand-alone cost" was proposed as one possible alternative, and comment was specifically sought on whether this standard might lead to unreasonably high rates.[471] The Notice also sought comment on other possible candidates for use as a generic standard, the kind of information required to use them, and the precedent for employing them.

b. Pleadings

238. AT&T, most LECs, and some OCCs, users, states, and other parties support the use of existing tariffed rates as the basis for setting initial price cap levels.[472] Many of these commenters argue that such an

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467 Notice, 2 FCC Rcd at 5217 (paras. 56-57).

468 Id. (para. 56).

469 Id.

470 Id. (para. 57).

471 Id.

472 See AT&T Reply at 3; Bell Atlantic Reply at 13; BellSouth Reply at 7; NYNEX Reply at 34-35; Ameritech Reply at 34-35; US West Reply at 2; GTOC Comments at 14; USTA Reply at 18; United Comments, App. A at 6; Centel Reply at 25-26; SNET Comments at 14; CBT Reply at 4; PRTC Reply at 5-6; Taconic Comments at 9; US Sprint Comments at 34-35; Cable & Wireless Comments at

approach would be administratively simple and would avoid the delay of initiating additional proceedings to establish cap levels under untested alternative criteria.[473] For example, AT&T argues that an open-ended inquiry into the reasonableness of every existing tariffed rate would result in postponement of urgently needed reforms for the foreseeable future, while Ameritech contends that application of "stand alone" cost or other "economically correct" general standards would result in controversy which would delay implementation of price caps.[474] These commenters assert that, since existing rates have already been subjected to tariff review scrutiny, use of such rates would provide some assurance to consumers and carriers that initial caps are not set at unreasonable levels.[475] Several add that to the extent that investigations or complaints pending at the time price caps are implemented result in refund requirements[476] or new rate prescriptions, cap levels can be adjusted to reflect the rates that should have been in effect during the disputed period,[477] and refund obligations can be satisfied outside of the caps.[478]

12; API Comments at 17-18; GSA Comments at 10; DOJ Reply at 38-39; Florida PSC Comments at 5-6; New York DPS Comments at 14; West Virginia Comments at 7. See also AT&T Rules Submission, Attachment A at 3; USTA Rules Submission, Attachment A at 7. Cf. Contel Comments at 13-14 (proposing that initial caps for LECs be set at existing rates, plus a margin, to protect the LECs from demand swings that may result from the added pricing flexibility accorded AT&T under the new regulatory approach); Rochester Reply at 5 (recommending that caps be set based upon stand-alone cost, but stating that use of existing rates would be acceptable if a single aggregate cap is used); ALC Rules Submission at 3 (for AT&T, existing rates would be used as basis for establishing price ranges for each rate element).

473 AT&T Reply at 3; Pactel Reply at 12-13; Ameritech Comments at 19; SWB Comments at 30-31; United Comments, App. A at 6.

474 AT&T Reply at 3; Ameritech Comments at 19.

475 AT&T Comments at 52, App. C at 16 (testimony of Baumol and Willig); BellSouth Comments at 22-23; Bell Atlantic Reply at 13; Pactel Reply at 12-13; SNET Comments at 14.

476 But see AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988), request for reh'g pending (striking down this Commission's refund requirements established in Docket 84-800).

477 AT&T Comments at 67-68; USTA Reply, Attachment A at 2; SNET Comments at 14.

478 AT&T Comments at 68; USTA Reply, Attachment A at 2. Cf. BellSouth

239. Those commenters who oppose starting from the status quo argue, among other things, that current rates have never been proven to be reasonable,[479] and that basing price caps upon them would likely perpetuate current inefficient or discriminatory rate structures and other pricing distortions,[480] particularly with respect to the LECs.[481] For example, the Networks object, inter alia, to LEC cost allocation procedures which they claim unreasonably raise the price of television service.[482]

240. Proposed solutions to the perceived problems with using existing rates vary. A few parties raise the possibility of applying economic criteria, such as stand-alone cost,[483] average incremental cost,[484] or marginal cost,[485] in setting initial caps. The overwhelming majority

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Comments at 34 (asserting that LECs should have the option of either making direct refunds to customers or having refunds reflected in the price caps).

479 E.g., ALC Reply at 23-27; Western Union Comments at 8; Networks Comments at 18-19; CCTU Reply at 21; IDCMA Reply at 36; Maryland PC Comments at 15.

480 E.g., ALC Reply at 23-27; Ad Hoc Reply at 7 n.3, 10-14; CCTU Reply at 21; Arinc Reply at 5-6; IDCMA Reply at 36; Citizens Comments at 9; Ohio OCC Reply at 9; DC PSC Reply at 4.

481 E.g., MCI Reply at 55; ALC Reply at 24; Western Union Reply at 5-6; Ad Hoc Reply at 7 & n.3; Networks Reply at 10, 11 n.40. But see Pactel Reply at 14 (contesting argument against starting from status quo by noting that the price cap concept itself is designed to strengthen incentives to cure current inefficiencies).

482 Networks Reply at 11 n.40.

483 Rochester Reply at 5.

484 See DOJ Reply at 38, 39 n.60 (advocates use of AT&T's existing rates, except in cases in which such rates are below average incremental cost, in which case that standard should be used); NTIA Comments at 61-62 (advocates use of existing rates, except if they fall significantly below incremental cost). Both DOJ and NTIA assert that in theory rates should approximate average incremental costs, but acknowledge that in practice such a standard may be too difficult to implement. See NTIA Comments at 61-62; DOJ Reply at 38-39.

485 See Illinois Comments at 22-23 (advocates establishing price caps at the level of long-run marginal cost but notes that such a method would be

of parties addressing the issue oppose the use of stand-alone cost.[486] Opponents of the stand-alone cost standard argue, among other things, that such costs are extremely difficult to estimate,[487] that the standard is unfair to ratepayers, since it allows carriers to retain for themselves the entire benefits of scale and scope economies,[488] and that the standard would constitute effective deregulation, particularly in local exchange markets, which are not "contestable."[489]

241. The principal sponsors of the stand-alone cost standard, AT&T consultants Baumol and Willig, contend that stand-alone cost is the proper competitive standard, since competitive or contestable markets will never permit prices to remain above such costs for long.[490] They maintain that the combined effect of interexchange competition in most geographic markets, nationwide averaged toll rates, and carrier initiated tariffs provides reasonable assurance that AT&T's existing rates would fall at or below that benchmark.[491] In case of challenge, however, Baumol and Willig

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burdensome; in light of existing competition, AT&T's current rates would probably be a satisfactory starting point); Citizens Reply at 6 (suggesting that initial caps be based upon marginal costs "if AT&T truly believes there is enough competition to drive down prices ....").

486 E.g., SWB Comments at 30-31; GTOC Comments at 15; Contel Comments at 13; Taconic Comments at 9; Western Union Comments at 8; GSA Comments at 10-11; TCA Comments at 8; ACTA Comments at 7; CFA Comments at 74-79; NASUCA Comments at 22-23; Florida PSC Comments at 6; New York DPS Comments at 14.

487 E.g., SWB Comments at 30-31; NYNEX Comments, App. B at 12-13 (testimony of Levin); GTOC Comments at 15.

488 E.g., GSA Comments at 11; CFA Comments at 74-76; Citizens Comments at 11-12; New York DPS Comments at 14. See also GTOC Comments at 15 (asserting that due to the wide difference between current rate-of-return methodology and stand-alone cost methodology, adoption of the latter would lead to customer confusion and anxiety).

489 TCA Comments at 8; CFA Comments at 74-79.

490 AT&T Comments, App. C at 19 (testimony of Baumol and Willig). See also Rochester Reply at 5 (advocating use of stand-alone costs as standard for setting initial caps or caps for new services). Cf. NYNEX Reply at 17 n.31 (asserts that in the context of a tariff investigation under Section 204 of the Communications Act rates should be assessed with reference to a zone of reasonableness bounded by stand-alone cost and marginal cost).

491 AT&T Comments, App. C at 19 n.* (testimony of Baumol and Willig).

assert that stand-alone cost is the proper standard against which rates should be tested.[492]

242. For the most part, opponents of starting from the status quo are silent concerning substantive criteria. Instead they argue that this Commission should, or legally must, begin formal ratemaking proceedings to prescribe initial cap levels,[493] and perhaps even the price cap adjustment mechanism itself.[494]

243. Several of the formal ratemaking proponents insist that the proposal to establish price caps, with or without floors, is a rate prescription within the purview of Section 205 of the Communications Act.[495] Citing Nader v. FCC,[496] CCTU explains that just as setting a specific rate of return is a de facto prescription "because setting an allowable rate of return effectively mandates what charges can be assessed," adoption of the price cap model is a prescription because it would establish the boundaries in which rates must fall to be found just and reasonable.[497] Consequently, these parties contend, this Commission must find the prescribed rates to be "just and reasonable" in accordance with the hearing procedures set out in Section 205.[498] CCTU contends that this Commission may

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492 Id., App. C at 20-21 (testimony of Baumol and Willig).

493 TCA Reply at 10; Ad Hoc Comments at 10-12; CCTU Reply at 21-22; Citizens Comments at 11; NASUCA Comments at 35; Maryland PC Comments at 19-20; Hawaii Comments at 6.

494 Ad Hoc Reply at 12-13 (asserts that this Commission must follow the hearing requirements of Section 205 of the Communications Act and make an affirmative finding that the initial price cap levels, aggregation levels, and adjustment factors are currently just and reasonable and are likely to produce just and reasonable rates in the future) (citing AT&T v. FCC, 449 F.2d 439 (2d Cir. 1971), on remand, 32 FCC 2d 619 (1971), aff'd sub nom. Nat'l Ass'n of Motor Bus Owners v. FCC, 460 F.2d 561 (2d Cir. 1972)).

495 CCTU Reply at 4; Ad Hoc Reply at 11; NASUCA Reply at 4; Maryland PC Comments at 20.

496 520 F.2d 182 (D.C.Cir. 1975).

497 CCTU Reply at 5.

498 CCTU Reply at 4; Ad Hoc Reply at 11-12; NASUCA Reply at 4; Maryland PC Comments at 20.

legally make policy affecting rates in a rulemaking such as this one, but that price caps may be established only upon completion of a hearing under Section 205 of the Communications Act.[499]

244. These commenters also insist that the record in this proceeding is insufficient to satisfy those procedures.[500] For example, Maryland PC claims that "the adjudicatory nature of proceedings aimed at AT&T alone" reinforces the conclusion that evidentiary hearings are required to institute caps, and that authorities requiring particular statutory language to warrant on the record hearings are distinguishable.[501] Ad Hoc cites authority[502] for the proposition that while the current record is inadequate to justify rate prescription for the LECs, it may be sufficient to justify a provisional plan for AT&T that includes the conversion of existing fixed rates into caps, but no other regulatory changes.[503] AT&T and the LECs dispute this contention, however, asserting that the price cap proposal is not a rate prescription because it does not dictate actual rates, but merely establishes parameters for streamlined regulatory scrutiny.[504]

245. Several parties also urge that initiation of price caps be accompanied by rate reductions.[505] Citizens argues, inter alia, that existing rates should be reduced at the outset to reflect changes in the Separations Manual and access rates, tax and pension expense decreases, and the impact of demand growth.[506] Some of these parties add that cap levels

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499 CCTU Reply at 5-6.

500 Id. at 6-7; NASUCA Reply at 4; Maryland PC Comments at 20.

501 Maryland PC Comments at 19-20.

502 MCI Telecommunications v. FCC, 627 F.2d 322 (D.C. Cir. 1980); MCI Telecommunications v. FCC, 712 F.2d 517, 533 (D.C. Cir. 1983), on remand, FCC Rcd 618 (1986).

503 Ad Hoc Reply at 14-15.

504 AT&T Reply at 25-27; NYNEX Reply at 31-32; BellSouth Reply at 6-7; US West Reply at 19. The GTOCs maintain that "nothing compels the Commission to undertake formal prescription proceedings where a fair exercise of the Commission's informed discretion says a formal proceeding is unnecessary." GTOC Reply at 17-18.

505 ICA Comments at 22; Ad Hoc Reply, ETI Report at 17; DC PSC Reply at 5 (citing ETI Report at 12-23).

should be adjusted downward at the outset of price cap regulation to prevent carriers from being rewarded for past inefficiencies that have been reflected in excessive depreciation rates and the amortization of reserve deficiencies.[507] These parties argue that this Commission has permitted carriers to accelerate their depreciation of investment in recent years, and that the costs of that accelerated depreciation should not be institutionalized in the price cap.

246. Similarly, these parties argue that amortization of the reserve deficiency be discontinued, and that carriers be forced to write off the reserve deficiency at shareholders' expense. In addition, these parties would assign a portion of future productivity gains to ratepayers in recognition of ratepayer financing of recent investment. Unless each of these measures is taken, the parties state, the price cap initiative will violate the tenets of Democratic Central Committee v. Washington Metropolitan Area Transit Commission.[508] Once an initial downward adjustment is made to the cap, these parties contend, this Commission could use rate-of-return monitoring and various carrier reports indicating extraordinary writedowns of asset values "to ensure that excessive production costs for telecommunications are borne by shareholders and ratepayers in the same proportions that these groups realize gains from earnings above currently-authorized levels."[509]

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506 Citizens Comments at 11. See also Hawaii Comments at 5-6.

507 Ad Hoc Reply, ETI Report at 16; DC PSC Reply at 5 (citing ETI Report at 12-23). But see MCI Reply at 28 (opposes immediate downward adjustments to AT&T's existing rates to account for depreciation changes, because the delay and cost involved would likely outweigh any benefits that might result).

508 Democratic Cent. Comm. v. Washington Metropolitan Area Transit Comm'n, 485 F.2d 786 (D.C. Cir. 1973), cert. denied sub nom. D.C. Transit System v. Democratic Cent. Comm., 415 U.S. 935 (1974). Ad Hoc Comments at 31-32. The ETI Report also recommends freezing depreciation at current levels and requiring that all future reductions in depreciation rates be flowed through to ratepayers. Id., ETI Report at 19. But see AT&T Reply at 62 n.* (Ad Hoc's conclusions are based on erroneous assumptions regarding rate base investment and depreciation rates); GTOC Reply, Attachment B at 7-9 (Ad Hoc's proposals are impossible to implement or make no sense); Ameritech Reply at 11-14 (arguing that existing rates already reflect productivity gains achieved by current investment, that price caps require productivity benefits to be passed on to ratepayers, and that retroactive ratemaking -- presumably to effectuate an initial downward adjustment in the caps -- is unlawful).

247. With respect to new services, most LECs propose that this Commission allow carriers to offer new services outside the cap initially, and then require them to bring those offerings into the cap after some period so that price and demand data based upon actual experience can be utilized in recalculating cap levels. These carriers have varying views regarding how prices for new services should be set. Some would at most require that the service satisfy the net revenue test.[510] BellSouth, for example, argues that use of this test will insure that the new service offering is not being subsidized by existing services.[511]

248. However, one carrier would require that initial rates for a new service fall within a range bounded on the high side by a rate of twice the service's incremental costs, and on the low side by application of the net revenue test.[512] US West argues that a cap of twice the incremental cost would assure the carrier a fair opportunity to achieve a positive net revenue stream.[513] Another carrier would have this Commission evaluate initial rates for different categories of "new" services based alternatively upon the net revenue test for tariffs which are alternatives to existing services, a value-of-service analysis for optional features which are non-essential services, competitive market prices for competitive services, or a "zone of reasonableness" bounded by stand-alone and marginal costs for new services otherwise priced at the carrier's discretion when these services are subject to a complaint or investigatory proceeding.[514]

249. Other commenters, supporters of immediate capping of new services, assert that calculating initial adjustments to cap levels based

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509 Ad Hoc Reply, ETI Report at 16.

510 BellSouth Comments at 35-36 (net revenue test); USTA Reply, Attachment A at 16 (net revenue test or cost support pursuant to Section 61.38 of this Commission's Rules, at the carrier's option); Ameritech Reply at 40 (carrier given complete flexibility regarding pricing of initial rates of new services, but those rates would be subject to Commission investigation and complaints prior to inclusion in the cap).

511 BellSouth Comments at 35.

512 US West Comments at 41-43. See also US West Rules Submission, Attachment A at 11.

513 US West Comments at 43.

514 NYNEX Comments at 34-35.

upon forecasted demand is administratively feasible, and any inaccurate demand estimates can easily be corrected based upon actual experience at the time of annual review.[515] Other proponents of immediate capping advocate differing standards for setting the initial rates of new services. The ETI Report suggests that the initial price should be left to the carrier based upon the assumption that introductory prices are likely to be low; it explains that by immediately capping new offerings, ratepayers are likely to receive the benefit of attractive initial pricing reflected in the price cap calculation.[516] Other proposed price setting standards include the net revenue test,[517] stand-alone cost,[518] full cost-of-service justification,[519] and reference to prices of direct substitutes.[520] Comptel contends that restructured rates should be subject to Commission prescription on a banded, rate element-specific basis, asserting that otherwise a carrier could effectively deregulate itself through continual tariff revisions.[521] GSA proposes that the carrier performing a restructuring be required to provide this Commission with representative samples of customer bills before and after restructuring to enable this Commission to determine whether a major redistribution of revenue recovery has resulted.[522]

c. Discussion

250. We tentatively conclude that existing prices are the most appropriate starting point for the limited purposes which they will serve under our proposed approach. As explained in Section V.B, infra, individual

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515 GSA Comments at 9-10; Ad Hoc Reply, ETI Report at 43-44.

516 Ad Hoc Reply, ETI Report at 43-44.

517 GSA Comments at 9. See also TCA Reply at 9 (proposing that new services be justified with "incremental cost" support).

518 Alabama PSC Comments at 5.

519 MCI Reply at 35-36; Comptel Comments at 17; New York DPS Comments at 13.

520 New York DPS Comments at 13.

521 Comptel Comments at iii, 15-16.

522 GSA Comments at 9. See also Arizona Comments at 6 (proposes that carriers file cost studies regarding anticipated effects of rate restructuring on residential and small business users).

rates will form but one component of our proposed aggregate cap, which will be comprised of the sum of individual rates weighted according to historical revenue share, and which will be adjusted according to various factors, including a productivity factor designed to give carriers an incentive to improve their efficiency. Existing rates will also be only a part of an individual service band, which will allow a range of flexibility for pricing pursuant to the methodology articulated in Sections IV.C.3 and V.B.3.b.iii, infra. The caps and bands, for those carriers electing them, in turn establish only an initial "tentative dividing line" between rates within and those outside the "no-suspension zone" the caps and bands create.[523] For the confined role which they will have under our proposed plan, and as we shall explain, we believe that existing prices are the superior alternative.

251. Although we regularly conduct rate investigations, such as those arising out of the annual access tariff filings,[524] many of the parties, in order to arrive at an alternative to use in lieu of existing prices, would have us undertake a comprehensive rate case investigation, exploring every aspect of the carrier's regulated business from investment decisions to service pricing, in detail. In our judgment and as history has borne out, it is likely that such an undertaking would not be productive. In this connection we note that we have never completed a rate case investigation for AT&T to the point where a methodology for individual service rates was established.[525] We have never undertaken a comprehensive rate base investigation for the LECs, and such an undertaking could involve an examination of over 1400 different carriers. Our tentative conclusion is that existing rates provide a reasonable basis for establishing caps and constitute the most pragmatic means of initiating this approach to regulation,[526] consistent with the requirements of the Act.

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523 See Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 653 (1978).

524 See, e.g., Annual 1988 Access Tariff Filings, 3 FCC Rcd 1281 (1987) (1988 Access Order), on recon., DA 87-1910 (Dec. 30, 1987), on partial recon., 3 FCC Rcd 926 (1988); Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 88-1, Phase I, 3 FCC Rcd 507 (1988); Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 88-1, Phase I, DA 88-294 (Feb. 29, 1988); Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Order Designating Issues for Investigation, DA 88-375 (released May 20, 1988).

525 See generally MCI Telecommunications v. FCC, 675 F.2d 408 (D.C. Cir. 1982).

526 In this connection we decline to follow the suggestion in the Cable & Wireless Rules Submission at 2 n.3, that caps should be set at levels of

252. Moreover, as many commenters suggest,[527] existing rates, although not determined to have been just and reasonable, have survived scrutiny under our existing tariff review procedures and in many cases challenge by opposing parties. Taken in the aggregate, they yield a level of profit we can reasonably expect to approximate what we have determined to be a just and reasonable rate of return on carrier investment.[528] Given a statutory framework which contemplates such carrier-initiated rates,[529] we see no reason to supplant them en masse for the purpose of initiating a price cap program. Our tentative conclusion in this regard is reinforced by our expectation that application of adjustment factors to such rates will result in even greater benefits to ratepayers than likely would be realized under conventional rate-of-return regulation adjustments.

253. We disagree with those parties who argue that we should or must prescribe initial rates. As explained above, such an approach likely would be adminstratively unfeasible, and would delay price cap benefits for consumers. Moreover, we are proceeding cautiously in adopting a new approach to dominant carrier regulation. We therefore implement our reforms primarily as a change in the tariff review process.[530] In addition, inclusion in the price cap regime itself is entirely elective with the carrier. A carrier is free to choose to continue under conventional regulation in the first instance. Once elected, a cap establishes a

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rates existing as of January 1, 1988. As Cable & Wireless concedes, id. at 2 n.3., these rates for AT&T remain subject to an investigation which is proceeding expeditiously to resolution. AT&T Communications, CC Docket No. 87-611, DA 87-1912 (released Dec. 30, 1987), further order, 3 FCC Rcd 339 (1988). However attractive the earlier date may be from the perspective of obviating the possibility of carrier manipulation of rates which they know in advance will form the basis for initial caps, we believe that the rates resulting from the pending investigation will provide a more accurate point from which to launch the price cap system.

527 See, e.g., AT&T Reply at 25-27; NYNEX Reply at 31.

528 See generally Nader v. FCC, 520 F.2d 182, 204 (D.C. Cir. 1975). Contrary to the position of one commenter, see Hawaii Comments at 4-6, use of cost-based rates as the starting point for price caps is not inconsistent with the price cap approach, which, as we have explained, continues to relate rates to cost.

529 See, e.g., 47 U.S.C. § 204.

530 See Section IV.D, infra.

no-suspension zone for tariff review purposes. Above-cap rates may be filed, but will generally be suspended and investigated. Such rates must, of course, meet the standard of justness and reasonableness mandated by the Communications Act as appropriately applied in such circumstances. Our price cap proposal thus does not have the authoritative effect of a prescription.

254. Some parties object to beginning from the status quo because of objections to particular existing rates. In some cases these objections have been rendered moot by our decisions prior to the implementation of price caps.[531] In other cases, we are moving as expeditiously as possible in pending investigations which address issues raised by parties in this proceeding.[532] To the extent that dissatisfactions

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531 See, e.g., Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Mimeo No. 4726 (released May 24, 1985), pet. pending, No. 87-1782 (filed Dec. 17, 1987 D.C. Cir.). Western Union's objections to increases proposed in special access rates in the 1988 Access Tariffs, see Western Union Reply at 5-6, are being addressed in the investigation instituted by Annual 1988 Access Tariff Filings, 3 FCC Rcd 1281 (1987) (1988 Access Order), on recon., 3 FCC Rcd 926 (1987); Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 88-1, Phase I, 3 FCC Rcd 507 (1988), on partial recon., 3 FCC Rcd 926 (1988); Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 88-1, Phase I, DA 88-294 (Feb. 29, 1988); Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, DA 88-375 (released May 20, 1988). We also note that studies reconciling data used by LECs in determining their overall interstate special access revenue requirement and in calculating interstate special access rates are due to be filed with this Commission on July 1, 1988, and should provide a reliable basis for more intensive scrutiny of special access rates. See Request for Information Concerning Local Exchange Carrier Special Access Demand Quantities, 2 FCC Rcd 3236 (1987), Erratum, 2 FCC Rcd 4350 (1987).

Questions about "the current imbalance in carrier common line charges," i.e., the difference in rates for originating and terminating CCL, see Arinc Reply at 5, would be rendered moot by our proposal to retain CCL charges under conventional regulation for the near future.

532 To the extent that television service users' concerns, see, e.g., Networks Comments at 22-26, have been recognized as valid in the past, they have resulted in investigations and refunds. See Annual 1988 Access Tariff Filings, 3 FCC Rcd 1281, 1299 (1987), Erratum, Mimeo No. 1136 (Dec. 31, 1988), on recon., DA 87-1910 (Dec. 30, 1987)(1988 Access Order) (granting petition against proposed access tariffs in part and rejecting it in part); Investigation of Special Access Tariffs of Local Exchange Carriers, CC

with specific rates continue to arise, parties are not precluded from seeking suspension or rejection, and retain their existing rights to initiate a complaint proceeding to vindicate their positions. Indeed, specific tariff or complaint proceedings, as opposed to a generic rulemaking such as the instant docket, would appear to be the appropriate fora for airing claims and obtaining remedies regarding particularized rate issues.[533] Should a capped rate under investigation ultimately be found unlawful, we stress that nothing in our proposed approach prevents us from ordering refunds and/or making appropriate adjustments to caps.[534] We seek comment on our tentative conclusion that our investigatory and complaint procedures will continue to provide an adequate remedy for parties challenging particular rate disparities under a cap regime.

255. Some parties argue that initiation of price cap regulation should be accompanied by an immediate rate decrease. Others maintain that it should be implemented along with a marginal increase in rates. As we explain below, although we fully expect that application of the adjustment factors we propose will result in increased benefits to ratepayers, we tentatively discern no compelling reason to accompany initiation of price caps with chang s either downward or upward in rate levels. We seek comment on this tentative assessment.

Docket No. 85-166, Phase I, 2 FCC Rcd 6847 (1987) (November 9 Order) (ordering refunds). Cf. New York Telephone Company, Tariff F.C.C. No. 41, Transmittal No. 774, Mimeo No. 6324 (released Aug. 12, 1986) (incorporating certain issues raised into ongoing investigation); Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal Nos. 121 and 127, Mimeo No. 5028 (released Sept. 30, 1987) (making rate increase subject to outcome of pending investigation). But cf. Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 91, DA 87-986 (released July 28, 1987)(declining to take requested action). Objections to 1988 access rates, see, e.g., Arinc Reply at 6, have been answered by our decisions in the 1988 Access Order resulting in $700 million in rate reductions from proposed rates for switched access and approximately $86 million in decreases from proposed special access rates. Our decisions in AT&T Communications, CC Docket No. 87-611, DA 87-1912 (released Dec. 30, 1987), and AT&T Communications, CC Docket No. 87-611, 3 FCC Rcd 339 (1988), resulted in a $772 million rate decrease in AT&T's services, and an investigation in which we expect to address rate level issues thoroughly and provide a reliable basis for capping AT&T's rates.

533 See, e.g., 1988 Access Order; November 7 Order.

534 See Section V.B.2, infra, for a discussion of the methodology we propose to use in such case.

256. Some parties advocate a specific adjustment factor initially to squeeze out unnecessary investment and expense occurring under rate of return, or a more rigorous short-term productivity factor to account for productivity gains attributable to pre-price cap investment.[535] We tentatively decide against these suggestions. Our decision to include a productivity adjustment at a level higher than historical productivity for the telephone industry will not permit carriers to benefit from past inefficiencies and will compensate ratepayers for any productivity gains attributable to pre-cap investment.[536] Moreover, many of the factors which parties suggest should initially drive rates down,[537] such as Separations Manual, inflation rate, access rate, and tax law changes, will be adjustment factors under price caps, and hence serve to trigger rate reductions as appropriate.[538]

257. We also tentatively find that Democratic Central Committee, which involved the distribution of capital gains on specific property transferred out of the rate base, does not compel an initial downward adjustment in price caps. Our price cap proposal simply designates a zone in which carriers are permitted to file tariffs subject to streamlined regulation and does not constitute any final determination as to what rates are just and reasonable. We do not read Democratic Central Committee for the broad proposition that each revision we make in our regulatory apparatus must be fine-tuned to reflect precisely any shift in the benefits or burdens imposed on ratepayers and shareholders, and the courts have not required us to do so. Indeed, in the past, we have looked to Democratic Central Committee for direct guidance in instances in which regulated assets were being transferred out of regulation, a circumstance not present in the instant proceeding.[539] Furthermore, we believe that adoption of the system

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535 See Ad Hoc Comments, ETI Report at 18-21.

536 See Section V.A.3.a.ii, infra. Efficiency gains under the price cap system will result from unleashing previously repressed economic incentives and will be shared with ratepayers. Thus, setting caps at existing rate levels will in no sense "'lock in' past inefficiencies" as some commenters claim. See, e.g., Ohio OCC Reply at 9.

537 See, e.g., Citizens Comments at 11; Hawaii Comments at 4-6.

538 We also do not believe that the depreciation rates we have established are excessive, as some parties suggest. See, e.g., Ad Hoc Reply at 17-18; Ad Hoc Comments, ETI Report at 17.

539 See, e.g., Procedures for Implementing the Detariffing of Customer Premises Equipment, 95 FCC 2d 1276, 1312-19 (1983), recon., 50 Fed. Reg.

of price caps as proposed is fully consistent with the basic principles of that case, which generally require an equitable balancing of investor and consumer interests in the ratemaking process. We reject Ad Hoc's argument that adoption of price caps will prevent ratepayers from receiving the benefits corresponding to burdens they bore under rate-of-return regulation. As we explain more fully below,[540] once the current five-year amortization of depreciation reserve imbalances expires for the LECs,[541] we will reflect this change in a downward adjustment to price caps. In addition, the productivity factor which is part of the proposed price cap plan has been carefully selected to ensure that ratepayers will receive economic benefits, in the form of lower rates, for the economic burdens they have borne.

258. As noted above and discussed more fully in Section V.A.4.e., infra, we are proposing to ensure that consumers benefit from the increased efficiencies price cap regulation should generate by including a "consumer productivity dividend" of 0.5 percent in the annual productivity adjustment to price caps. As a means of responding to suggestions that consumers realize substantial benefit from price cap regulation immediately upon implementation of this alternative form of regulation, we seek comment on an alternative proposal. Under this proposal, the value of the consumer productivity dividend during the period from initiation of price cap regulation through completion of the comprehensive performance evaluation (i.e., four years) would be flowed through to consumers in the form of a rate cut on the day price cap tariffs initially take effect. Under this alternative proposal, therefore, a productivity adjustment factor higher than 3.0 percent would be applied to rates scheduled to take effect on April 1, 1989, and a 2.5 percent factor would then be used when making annual adjustments in each of the next four years.

259. We also seek comment on another alternative proposal, pursuant to which carriers electing price caps would be required to

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1016 (1985), 57 Rad. Reg. 2d 1089 (1985); Separation of Costs of Regulated Telephone Service From Costs of Non-Regulated Activities, CC Docket No. 86-111, 2 FCC Rcd 1298 recon., 2 FCC Rcd 6283, 6293-96 (1987), pets. for rev. filed sub nom., National Tel. Coop. Ass'n v. FCC, No. 87-1771, (filed Dec. 15, 1987 D.C. Cir.); Southwestern Bell v. FCC, No. 87-1764 (pet. for rev. filed Dec. 14, 1987); Western Union Tel. v. FCC, No. 87-1817 (motion for voluntary dismissal granted Apr. 15, 1988 D.C. Cir.).

540 See Section V.A.4.e, infra.

541 We instituted this five-year amortization effective January 1, 1987. See Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, 3 FCC Rcd 984 (1988).

institute a rate cut effective April 1, 1989, designed to ensure an immediate "squeezing out" of inefficiencies reflected in existing rates. We tentatively propose to limit the implementation of this alternative proposal to the local exchange carriers. Commenters responding to this alternative proposal are encouraged to specify the magnitude of their proposed rate adjustments and the empirical basis for such proposals, as well as any legal issues raised by this alternative proposal.

260. In addition, we decline to follow the suggestions of those commenters advocating a marginal increase in rates at the outset. A representative of AT&T's competitors argues that rates should be set slightly above tariffed prices "in order to account for prospective cost pressures and to avoid the need to adjust the ceiling rates ...."[542] We decline to adopt this suggestion. No party provided evidence of these "prospective cost pressures." Absent such evidence, increasing rates prospectively runs the risk of establishing a pricing umbrella that may prove beneficial to certain competitors but would harm consumers.

261. In light of the role which we expect the productivity adjustment factor to play in motivating a carrier to even greater efficiencies, we also tentatively decide against the position taken by some carriers that there should be a positive productivity adjustment for pre-cap modernization on the theory that an already modernized operation will have greater difficulty in making post-cap productivity gains. If, as certain parties contend,[543] existing rates, as a result of investment in more efficient plant, already reflect productivity improvements in which ratepayers are entitled to share, application of the productivity adjustment to such rates will spur a carrier to even greater productivity gains and attendant consumer benefits.

262. We tentatively find that existing rates provide a point of embarkation for caps which is superior to use of a general standard, as alternatively suggested in the Notice. We agree with the overwhelming majority of commenters that use of a stand-alone cost test for establishing initial rates likely would prove difficult to apply. The stand-alone cost of a particular product or set of products is the minimum cost of producing that product or set of products alone. If there are no cost advantages to joint production of a particular set of products, then the sum of the stand-alone costs for those products is equal to the total cost of producing that set of products. If there are cost advantages to joint production, then the sum of the stand-alone costs is greater than the total cost of

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542 See Comptel Comments at ii-iii.

543 See Ad Hoc Comments, ETI Report at 20-21.

producing the set of products.[544] We also concur in GSA's concern that use of stand-alone cost might require the "paper engineering" of hypothetical telephone networks and create other complex and expensive implementation problems.[545] Similarly, as suggested by some commenters,[546] we believe that wholesale realignment of rates to comport with an incremental costing standard would be unduly expensive and time-consuming.[547] Moreover, as we explain above, use of an incremental costing standard to set rate maxima for all its services would not permit a carrier to recover fully its revenue requirement.[548]

263. With respect to new offerings, we propose to evaluate such rates using a modified version of the net revenue test that we currently use to evaluate optional calling plans.[549] We have used the net revenue test in the past and found it to be a prudent standard.[550] For new services that represent a technological change, the lack of a developed market for such an untried offering makes it unlikely that a carrier would charge excessive prices. For new services that are merely a substitute for an existing offering, the existence of a cap on the existing offering would check excessive pricing of the "new" service, since customers could merely choose the lower-priced capped offering. We believe that requiring

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544 For a precise discussion of cost concepts applicable to the analysis of multiproduct firms, see W.J. Baumol, J. Panzar and R. Willig, Contestable Markets and the Theory of Industry Structure, ch. 3 & 4, at 46-95 (1982 ed.).

545 GSA Comments at 10-11.

546 See, e.g., Illinois Comments at 22-23; DOJ Comments at 38.

547 We can discern no rational basis for adopting US West's suggestion of using two times incremental cost as a ceiling on the rates for new services. See US West Comments at 41-43.

548 We discuss use of a form of incremental cost as a minimum cost standard in Section IV.D., infra.

549 See Section IV.D, infra. Such services, however, would not actually be subject to price cap requirements for up to one annual cap adjustment cycle. Because we propose to hold new services out of the cap for a period of time, by the time such a service were made subject to the cap structure, historical demand would be available to "weight" the tariffed rate for aggregate capping purposes.

550 See generally Section IV.D, infra.

traditional cost justification for such services is unnecessary to protect ratepayers in light of these considerations and would likely lead to delays in introduction of new services and thus dampen incentives to innovate, which incentives are explicitly encouraged by the Communications Act.[551] For restructured services, the carrier will be required to demonstrate that it continues to comply with price cap requirements.[552]

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551 See Section 7 of the Communications Act, 47 U.S.C. § 157.

552 This test is elaborated on in Section IV.D, infra.

C. Additional Safeguards for Consumers and the Competitive Process

1. Summary of Notice

264. We elicited comment in the Notice regarding different ways of interpreting what is meant by a price cap.[553] We suggested that the concept could range from a broad requirement imposing a ceiling on the average rates of capped services overall, to a narrow definition imposing a ceiling on each rate element of a service, to some combination of the two extremes.[554] We indicated that the issue involved was which interpretation would strike the best balance between our primary objective of protecting ratepayers and giving carriers the flexibility and incentive to innovate and adapt in the most efficient way.[555] We stated that, depending on which definition of price caps was adopted, caps could reduce, if not eliminate, a carrier's ability to raise its rates, to reap the benefits of predation, and to engage in predation.[556]

265. We tentatively concluded that retention of our bar against resale restrictions would offer additional protection against predatory rates, and sought comment on other possible alternative safeguards.[557] We asked that those concluding that additional safeguards against predation were necessary identify the least intrusive requirements that they believed would meet this goal.[558] In this section we present our tentative conception of how price caps should be interpreted and our proposed means of checking carriers' ability to engage in predation, and we also discuss our view that these proposals will contribute to providing ratepayers with additional protections against unjust and unreasonable rates.

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553 Notice, 2 FCC Rcd at 5215-16 (paras. 45-47).

554 Id. (paras. 46-47).

555 Id. (para. 47).

556 Id. at 5216 (paras. 48-49).

557 Id. at 5216 (paras. 50-51).

558 Id. (para. 51).

2. Pleadings

a. Composite Cap Approach

266. Some commenters contend that a composite price cap will serve the public better than would a disaggregated approach. They assert that use of a single cap will encourage market pricing, which will lead to increased use of the public switched network.[559] Most BOCs and major independent LECs favor an overall price cap,[560] and several recommend that the aggregate cap be based on the weighted averages of the carriers' rates.[561] They submit that separate price caps on each of the thousands of rate elements would be unduly burdensome, would anchor price caps in existing inefficiency, and would inhibit carrier flexibility.[562]

267. Several OCCs, users, and other commenters, however, see anticompetitive behavior as a threat under price cap regulation,[563] particularly if only a limited number of caps are established.[564] NTN submits that since competitors have been cutting into AT&T's market share while investing heavily, AT&T has the incentive to eliminate potentially

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559 See, e.g., Contel Comments at 11; USTA Comments at 14.

560 See, e.g., SWB Comments at 2; Contel Comments at 10; USTA Comments at 14; United Reply at 8; Taconic Comments at 8; CBT Reply at 4.

561 BellSouth Comments at 18-20, App. B at 1-2; Bell Atlantic Comments at 4 & n.4; NYNEX Comments at 28; Pactel Comments at 4; SNET Comments at 12-13; Ameritech Comments at 17; United Comments, App. A at 2-4; Centel Comments at 9; Rochester Comments at 13; CCIA Reply at 11; USTA Rules Submission, Attachment A at 7-8. DOJ asserts that if services are to be aggregated under an overall cap, the services should be weighted according to historical pre-cap demand quantities. DOJ Reply at 32.

562 E.g., US West Comments at 30; NTIA Reply at 11. Although they do not advocate the composite cap but propose "hybrid" plans, AT&T and the GTOCs agree that total disaggregation would be so complex as to defeat the purposes of the price cap model. AT&T Reply at 3, 20; GTOC Comments at 12.

563 E.g., MCI Reply at 23; US Sprint Reply at 15; ALC Reply at 11; NTN Comments at 18; Teltec Comments at 6-7; Clark Comments at 1-2; USTS Comments at 2; Cable & Wireless Comments at 7; ACTA Comments at 4-5; Comptel Comments at 9-10; ADAPSO Comments at 5; Locate Comments at 5; NASUCA Reply at 21-23; Colorado PUC Comments at 4-5; New Hampshire PUC Comments at 5.

564 E.g., ACTA Comments at 4-5; Cable & Wireless Comments at 7-8.

vigorous competition while these competitors are still vulnerable.[565] NASUCA argues that because of its overwhelming market share and scale economies, AT&T can drive competitors out of the market simply by exploiting its cost advantages.[566] Similarly, Cable & Wireless contends that AT&T's market power may enable it to price below costs for short periods of time to "discipline" competitors without actually attempting to drive them out of the market.[567]

268. Other parties doubt that predation will be a significant problem under price cap regulation.[568] AT&T contends that pricing below costs would be uneconomical absent the prospect of eliminating competition and extracting monopoly revenues sufficient to recover its costs, a prospect which it argues does not exist due to the large number of interexchange competitors with sunk investment.[569] In addition, some commenters submit that the complaint process,[570] the antitrust laws,[571] the ban on resale restrictions,[572] and the continuation of geographic toll rate averaging[573] will provide adequate checks against predatory conduct. Similarly, some parties assert that the cap adjustment mechanism will preclude price increases large enough to allow recoupment of the costs incurred through

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565 NTN Comments at 18-19.

566 NASUCA Reply at 22-23.

567 Cable & Wireless Comments at 8.

568 See, e.g., US West Comments at 44-45; BellSouth Comments at 45-46; NYNEX Comments, App. B at 11-12 (testimony of Levin); GTOC Comments at 32-33; SNET Comments at 14-15; Rochester Comments at 15; Centel Comments at 10-11; CCIA Comments at 10; DOJ Reply at 41 n.65.

569 AT&T Comments at 21. Accord DOJ Reply at 41 n.65.

570 BellSouth Comments at 46; NYNEX Comments at 21; GTOC Comments at 33; Centel Comments at 11; Florida PSC Comments at 5.

571 BellSouth Comments at 46; Rochester Comments at 15; Florida PSC Comments at 5.

572 Centel Comments at 11; Rochester Comments at 15.

573 Florida PSC Comments at 5.

anticompetitive behavior,[574] while some small LECs note that they lack the economic resources and market strength to engage in predation.[575]

b. Pricing Rules, Minimum Duration Requirements, and Price Floors

269. To safeguard consumers from bearing the costs of predatory conduct, many commenters urge that this Commission develop pricing rules for certain services within an overall cap,[576] that we establish price floors for at least some services,[577] or that we prescribe minimum duration requirements.[578] Although the pricing restrictions proposed by the parties vary widely, they are all designed to protect consumers from marked rate increases in the manner least intrusive to carrier flexibility.[579] Other

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574 GTOC Comments at 33; NYNEX Comments, App. B at 11-12 (testimony of Levin); BellSouth Comments at 46; SNET Comments at 14-15; USTA Comments at 18. SNET explains that since all services within a cap would theoretically be priced at levels that optimize productivity and earnings, underearnings on one service could not be recovered by increasing the prices or profits of another. SNET Comments at 14-15. BellSouth consultants Kahn and Shew maintain that so long as this Commission adopts different caps for demand-elastic and demand-inelastic services, the opportunity for predation is no greater than in a competitive market. BellSouth Comments, App. A at 20.

575 OPASTCO Comments at 3.

576 Bell Atlantic Comments, Attachment I at 6-7; SWB Comments at 28-29; NYNEX Reply at 8; Ameritech Comments at 17; United Comments, App. A at 3; USTA Comments at 15-16; cf. BellSouth Comments at 21 (pricing rules should be adopted only if absolutely necessary, but LECs should be prevented from raising subscriber line charges beyond the level recommended by the Joint Board and this Commission).

577 Teltec Comments at 7; USTS Reply at 4; Clark Comments at 2; Cable & Wireless Reply at 6-7; ACTA Comments at 2-3; TCA Comments at 15-16; Alabama PSC Comments at 3. US Sprint supports price floors limited to AT&T's private line offerings. US Sprint Reply at 7; see also US Sprint Rules Submission at 7.

578 Ad Hoc Reply at 31; id., ETI Report at 44; GSA Comments at 6. See also TCA Reply at 20 n.48 (minimum duration requirements should be sufficient to protect against predation, but Commission should reserve the ability to impose price floors if necessary).

579 For example, Centel calls for pricing rules which would address minimum notice requirements and the frequency and range of price changes.

commenters assert, however, that measures less intrusive than price floors would not prevent predatory pricing.[580] They maintain that the establishment of a lower boundary would both protect consumers from unreasonably high rates and foster competition in the telecommunications industry.[581] Moreover, they imply that consumers would not be denied the benefits of cost reductions since carriers would remain free to set rates below floors upon a showing that those rates were cost justified.[582] Several commenters, not all of whom support price floors, propose standards for setting floors in the event they are adopted.[583]

Centel Comments at 9-10. Pactel proposes that any pricing guidelines this Commission may deem necessary in given cases should be proposed by each company and approved by this Commission. Pactel Comments at 4. Contel suggests that this Commission retain certain rate level and structure requirements, such as those governing the subscriber line charge, for an .:

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interim period. Contel Comments at 11 n.1. The GTOCs would not object to pricing rules for some "Category 2" services, if the rules would be phased out on a sunset schedule. GTOC Comments at 12 n.3. ADAPSO argues that a carrier should be required to provide the user community with six months' notice of price increases within a grouping which equal or exceed 5 percent. ADAPSO Reply at 14.

580 E.g., USTS Reply at 4 (highly disaggregated caps may prevent full recoupment of below-cost pricing but will not thwart predation); Teltec Comments at 6-8 (complaint process, antitrust laws, ban on resale restrictions, minimum duration requirements insufficient to prevent predatory behavior); Cable & Wireless Reply at 10 (antitrust laws not a sufficient deterrent to predation).

581 E.g., Comptel Comments at 11.

582 E.g., US Sprint Comments at 51 & n.31; Teltec Comments at 7.

583 See, e.g., West Virginia Comments at 7 (incremental cost); Illinois Comments at 25 (long run marginal cost); BellSouth Comments at 46 (average variable cost); Michigan PSC Comments at 13 (access cost "plus some portion of joint costs of providing a particular category of service"); Comptel Comments at 13-14 (percentage below the price ceiling); US Sprint Comments at 50-51 (stepped annual percentage decreases in floors relative to initial ceilings); see US Sprint Rules Submission at 7; but see BellSouth Comments at 46 (use of percentage of ceiling bears no relation to costs and could result in price umbrellas); ACTA comments at 5-6 (opposes percentage of

270. Opponents of price floors contend that their implementation would increase the administrative costs of price cap regulation.[584] They note the difficulty in maintaining appropriate floors,[585] and predict that improper floors would create anticompetitive pricing umbrellas.[586] For example, Ad Hoc asserts that if floors for a dominant carrier are set too high, an inefficient competitor could survive by charging below-floor rates.[587] Opponents of floors also argue that prohibiting rates below a set minimum will deny customers the legitimate rate reductions caused by new technologies and enhanced efficiency.[588] Moreover, several commenters deem price floors unnecessary due to the decreased risk of predation under a price cap regime.[589]

271. Several parties prefer minimum duration requirements as a check on predatory behavior. Some commenters submit that such requirements would protect consumer interests by restricting cost-shifting but allowing carriers to pass cost savings through to customers without creating a

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ceiling method); DOJ Reply at 41 (because percentage of cap approach bears no relation to net incremental revenues, price floor could prohibit legitimate price decreases and permit some predatory pricing). See also Ad Hoc Comments, ETI Report at 33 (use of "net revenue test" for price floors would be extremely complex and would call for additional data collections). DOJ implies that the net incremental revenue standard is the most rational economically, but asserts that due to difficulties in estimating such revenue accurately, price floors would be unworkable. DOJ Reply at 40.

584 AT&T Comments, App. C at 29-30 (testimony of Baumol and Willig); SWB Comments at 35-36; Pactel Reply at 19; Rochester Comments at 15; NTN Comments at 25.

585 E.g., NTN Reply at 12.

586 See, e.g., AT&T Reply at 4; Ad Hoc Comments at 28. See also BellSouth Comments at 46 (defining floor as percentage of ceiling would establish a price umbrella for less efficient carriers). Contra US Sprint Reply at 17 (price floors are necessary to curb predation; "cushion" it has proposed is low enough to avoid creation of a pricing umbrella); see US Sprint Rules Submission at 7 (initial minimum price would equal initial rate less 5 percent, decreasing to 20 percent in the fourth year).

587 Ad Hoc Comments at 28.

588 DOJ Reply at 40-41; Centel Comments at 10-11; Rochester Comments at 16.

pricing umbrella for inefficient competitors.[590] Opponents suggest, however, that minimum duration requirements are unnecessary since current procedures guard against predation,[591] that such requirements improperly limit carrier flexibility,[592] or that they do not effectively eliminate anticompetitive pricing.[593]

c. Rate Bands

272. Some commenters suggest that this Commission establish rate bands whereby rate changes within a certain percentage above or below a given midpoint would be subject to streamlined review.[594] For example, MCI proposes that AT&T be permitted to raise or lower its non-MTS rates 5 percent above or below an approved median free from full tariff scrutiny.[595] Similarly, Cable & Wireless advocates the establishment of 5 percent upper and lower bands for AT&T's non-MTS offerings.[596] ALC recommends upper and lower bands of 3 percent for the first year of the price cap plan and 5 percent for the following year.[597] Proponents submit that a properly designed banding system would afford dominant carriers the rewards of fair competition without permitting abuse of market power to the detriment of

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589 AT&T Reply at 4; SWB Comments at 34-35; Pactel Reply at 18-19; Oftel Comments at 7.

590 E.g., Ad Hoc Reply at 31. See also GSA Comments at 6 (minimum duration requirements would be compatible with competitive bidding, since most competitively bid contracts extend over several years).

591 See, e.g., SWB Comments at 35-36; SNET Comments at 22.

592 SNET Comments at 22; Western Union Comments at 7; MCI Comments at 26-27.

593 Teltec Comments at 6.

594 MCI Reply at 23; MCI Rules Submission, Attachment at 3; Comptel Comments at 11-12; USTS Comments at 2 (supports Comptel approach); ALC Comments at 47; ALC Rules Submission at 3-4; Cable & Wireless Comments at 12. Cf. NTN Reply at 13 (prefers rate-of-return regulation, but proposes banded pricing by rate element if this Commission decides to adopt the price cap approach).

595 MCI Reply at 7.

596 Cable & Wireless Comments at 14. For MTS, Cable & Wireless proposes a price ceiling set at the MTS day rate and a floor set at the Pro America

competitors and consumers.[598] In addition, they maintain that a banded approach would be relatively simple to implement.[599] On the other hand, Ad Hoc, particularly skeptical of the MCI plan, asserts that if price caps spur innovation as some commenters predict, AT&T's cost savings should exceed 5 percent.[600]

d. Category-Specific Caps

273. Other parties submit that the optimum balance of carrier flexibility and customer protection can be achieved via a price cap plan that falls somewhere between an overall cap and total disaggregation.[601] For example, AT&T proposes that basic MTS service should be capped separately from other interexchange services, which would be placed under a single cap pending further streamlining.[602] Although AT&T believes a single cap is appropriate due to the intense competition it contends that all its interexchange services face, it states that it would agree to a separate cap on MTS to assuage this Commission's concerns regarding exorbitant pricing of less competitive services.[603] Similarly, some parties would establish two overall price caps for switched access and special access.[604] US West

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rate. Id.

597 ALC Comments at 47.

598 Comptel Comments at 11-12; MCI Reply at 11-12.

599 MCI Reply at 22.

600 Ad Hoc Reply at 29-30.

601 See, e.g., Cable & Wireless Comments at 14-15; (recommends element-specific caps for private line services and highly sophisticated offerings); EDS Comments at 13 (advocates three separate price caps covering MTS, private line services, and all other services).

602 AT&T Comments at 47, 49.

603 Id. at 47. See also GTOC Comments at 11-13 (proposes one cap for "Category 1" services, phase-out of all regulation on "Category 2" services; for AT&T, "Category 1" includes only standard MTS and "Category 2" includes all other regulated services; for the LECs, "Category 1" includes switched access and transport and "Category 2" includes all other interstate services); GTOC Rules Submission, App. A at 6-7; CCIA Reply at 10 (supports AT&T approach).

604 See, e.g., Contel Comments at 11; US West Comments at 31-35 (proposes

recommends such an approach because it predicts that total disaggregation would be unduly complex, and that a single price cap would operate as a revenue cap and provide carriers with an incentive to underinvest.[605] Ad Hoc advocates use of the four price index categories proposed by the ETI Report.[606] It recommends that service elements within each of these groupings should be disaggregated in varying degrees to minimize the incentive to cross-subsidize, as well as to ensure that any attempt to cross-subsidize can be neutralized by customers switching from the costly subsidizing service to the less expensive subsidized service.[607]

274. In addition, several commenters maintain that increased competition will discourage cross-subsidization and other anticompetitive practices. Some suggest that initial categories be disaggregated, with a gradual transition to less restrictive groupings as certain services become competitive. They submit that this would provide a perpetual balance of rate protection and carrier flexibility.[608] Other parties, also seeking an appropriate mix of carrier and consumer interests, would base price cap categories on competitive considerations at the outset of price cap regulation. For example, US Sprint proposes "time of day" caps to protect both business and residential callers.[609] Many other commenters propose similar plans with varying degrees of aggregation to shield customers of less competitive services from the effects of predatory conduct.[610]

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two "reference caps" and individual rate element limitations within each cap); see also US West Rules Submission, Attachment A at 9. Although Bell Atlantic advocates a single cap for all services, it states that it could accept the two-cap approach. Bell Atlantic Reply at 9 n.12.

605 US West Comments at 31.

606 Ad Hoc Comments at 25. The four categories are (1) common switched services (MTS); (2) business switched services (WATS, Megacom, Pro America, SDN); (3) analog private line services; and (4) other private line and related services. Id. See also TCA Reply at 8 (favors the proposal contained in the ETI Report).

607 Ad Hoc Reply at 21.

608 MCI Comments at 24; ADAPSO Reply at 9-10; West Virginia Comments at 6.

609 US Sprint Comments at 23.

610 See, e.g., ADAPSO Reply at 7-8 (proposes five price cap groupings); AT&T Comments, App. C at 2 (testimony of Baumol and Willig) (to avoid unreasonably high prices, caps could be placed only on services for which competition is not yet adequate); AARP Comments at 5 (the residential

e. Service-Specific or Rate Element-Specific Caps

275. Other commenters contend, however, that a high degree of aggregation will lead to cost-shifting from very competitive to less competitive services or will otherwise frustrate the objectives of the price cap plan. They submit that disaggregation will facilitate rate stability by preventing sudden price changes.[611] Most OCCs, large users, and consumer groups, as well as several states, urge that this Commission adopt price caps on a service-specific or rate element-specific basis to shield consumers from the effects of extensive carrier flexibility.[612]

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market is not sufficiently competitive to withstand imposition of a single price cap; daytime, evening, night, and weekend MTS should be separately capped); NTIA Reply at 10 (separate caps should be applied to each service not subject to effective competition and one aggregate cap should be implemented for competitive services); DOJ Reply at 31-32 (competitive and non-competitive services should not be placed under the same cap and services which are substitutes for one another should be capped together); Arizona Comments at 3 (services upon which residential and small business customers rely should be capped separately, while more flexibility is permissible for other services).

611 E.g., API Comments at 15; GSA Comments at 8.

612 MCI Comments at 17-20; Comptel Comments at ii, iv, 12; USTS Comments at 2; PRTC Reply at 10; Teltec Comments at 3; NTN Reply at 13; McCaw Reply at 4; ACTA Comments at 6-7; Western Union Comments at 7; ALC Comments at 47; API Comments at 15; API Rules Submission, App. at 1; GSA Comments at 8; Citizens Comments at 6; NASUCA Comments at 35; GECS Reply at 7-8; TCA Comments at 6; Arinc Reply at 7; IDCMA Reply at 37; CCTU Reply at 23; Joint Board Reply at 4; Pennsylvania Reply at 5; Florida PSC Comments at 4; Michigan PSC Comments at 18; Colorado PUC Comments at 14; New York DPS Comments at 12-13. The Networks maintain that any price cap proposal should distinguish terrestrial television service from other private line or special access services by imposing separate price caps reflecting service-specific costs. Networks Comments at i, 7, 12-13.

3. Discussion

a. Introduction

276. In this Section we determine the contours and content of our proposed price caps. As the comments demonstrate, and the Notice predicted, our options are myriad. As a control on price increases, the possibilities range from, on the one extreme, a broad concept of caps under which rates for a large number of services would be aggregated, to, on the other extreme, a narrow rate element-by-rate element approach. A broad approach would maximize carrier flexibility to respond to changing technological and market conditions. To the extent that it maximized a carrier's opportunities for innovation and incentives for economically efficient pricing and use of the network, as some commenters argue,[613] it would benefit consumers. The other extreme -- a service-by-service or rate element-by-rate element application of a cap -- would maximize regulatory control over prices, thereby directly protecting ratepayers. It would also, in our tentative view, potentially permit pricing distortions between substitutable services to occur, unduly limit a carrier's pricing flexibility, and be excessively complex to administer. This very strict approach potentially sacrifices some of the incentives to innovation and efficiency which a broader interpretation of a price cap would permit and which would contribute to long-run consumer gains. Thus, our goals are to ensure that ratepayers are charged the lowest reasonable rates, and that carriers are permitted the flexibility to achieve efficiencies that would contribute to the long-run viability of the telephone network and hence, long-run consumer benefits.

277. There is another factor to be considered in formulating an approach to price caps. That element is whether our approach must also include safeguards against the carrier's establishing rates that are too low. Such pricing has the potential to distort, if not destroy, the competitive process and harm consumers. One of the difficulties, however, in controlling predatory conduct is that of distinguishing legitimate, indeed, beneficial, rate reductions from those which are anticompetitive in nature. We thus seek to formulate a price cap approach which captures for consumers the benefits of legitimate price reductions and also safeguards the competitive process.

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613 See, e.g., Contel Comments at 11.

b. Baskets and Bands

278. For the reasons we explain below, we tentatively decide that a combination of "baskets" (aggregate caps) and "bands" (maximum and minimum limits on individual service prices) would best satisfy the objectives which guide our determination of what a "price cap" is. We believe that relatively broad baskets, with bands on the individual rate elements of services within each basket, provides us with the regulatory control required to insure that consumers receive the benefits we expect to flow from price caps and that competition continues to grow. At the same time this approach leaves the carrier with the freedom to manage its business in the most efficient and innovative fashion.

279. By "basket" we refer to that group of services, the weighted average of whose prices must remain below the price cap applicable to that basket, or as we describe it below,[614] the Price Cap Index (PCI). Capping a basket of services assures us of regulatory control over prices charged to the class of consumers of the services within the basket. Thus, as a whole, consumers of services inside a basket will experience the lower rates which application of the price cap promises. It also assures, along with other existing regulatory controls,[615] that cross-subsidization of services outside the basket by those inside does not occur. This is so because the carrier cannot go above the cap applicable to the basket to recoup revenues siphoned off to subsidize other services. Ideally, all services which are substitutable for each other would be included within the same cap. This would eliminate the pricing distortions which, as some parties suggest,[616] might otherwise arise if significantly substitutable services were capped at different rate levels. Thus, to the extent possible, we would attempt to group services which are cross-elastic within the same basket. We would also attempt to group services in such a way as to be able to use baskets to simplify administration of the allocation of adjustment factor changes.

280. We believe that a "two-basket" approach, i.e., one which uses two composite caps, advocated by numerous parties,[617] is the appropriate one. This course of action allows a carrier's efforts to

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614 See Section V.B.3, infra.

615 We propose, for example, to retain our existing rules allocating costs between regulated and nonregulated services. See Section VI.C, infra.

616 See, e.g., DOJ Reply at 31.

617 See, e.g., Contel Comments at 11; US West Comments at 31-35.

respond to the new circumstances presented by a rapidly changing industry to remain unimpeded. It thus promises to result in long-run consumer gains. It would also safeguard the well-being of that general class of ratepayers subscribing to services within the basket. We will use different regulatory tools and individual rate bands as direct protections for consumers of specific services.

281. For AT&T, if it elects price cap regulation, we propose separate baskets for private line and for those services that use the switched network. This division would mirror current allocation practices,[618] and in contrast to the four-basket approach advocated by Ad Hoc,[619] would simplify administration of access flow throughs. It would ensure that those services using the common switched network in the same manner will share jointly in the allocation of cost changes. It would comport with our long-standing policy of "ensur[ing] that message services (MTS and WATS) do not subsidize private line services."[620] We tentatively find that the delimited categories are broad enough to insure that significantly cross-elastic services will be included within the same basket, thereby minimizing the possibility of pricing distortions among such services.

282. Application of this same methodology to the LECs would result in a switched service basket dominated for the most part by rate

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618 AT&T reports its interstate revenues, investments, and expenses according to an MTS and WATS category and a private line category, pursuant to a waiver of the ICAM. See American Telephone and Telegraph Co., Request for Permission To File 1986 Fully Distributed Cost Report for Switched Services and Private Line Categories, 2 FCC Rcd 4044 (1987). See also Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies To Establish Reporting Requirements, 2 FCC Rcd 5340, 5340 (1987). We are presently considering whether to make that waiver permanent. See FCC Public Notice, "American Telephone and Telegraph Co. Requests Modification of the Interim Cost Allocation Manual," 2 FCC Rcd 1621 (1987). We also require AT&T to report according to these categories for rate-of-return enforcement purposes. See Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, 50 Fed. Reg. 41350, para. 9 (Oct. 10, 1985), on recon., FCC No. 86-114 (Mar. 24, 1986), on further recon., FCC No. 86-544 (Jan. 14, 1987), remanded on other grounds sub nom. AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988), request for reh'g pending.

619 See Ad Hoc Comments at 25; id., ETI Report at 38-44.

620 MCI Telecommunications v. FCC, 675 F.2d 408, 416 (D.C. Cir. 1982).

elements which collectively form but one service, switched access.[621] Although this delineation would leave a LEC with considerably less flexibility in its switched basket than AT&T would have, we tentatively find that this differentiation is justified by the relatively lesser degree of competition for the LEC services involved[622] and the correspondingly greater need for regulatory control over pricing flexibility. We thus propose to separate LEC switched services from all other (mainly special access) interstate services which they offer and which are subject to caps.[623] This approach appears to us to provide carriers with sufficient flexibility to develop service innovations and achieve efficiencies, while insuring that ratepayers of services within the basket are as a whole protected.

283. There is some suggestion in the comments that the competitive considerations we have described in the preceding paragraph also necessitate a further disaggregation of LEC special access services. Concerns are expressed in the record that LECs would have an opportunity to engage in cross subsidization and discriminatory conduct in the provision of special access services if these services are not disaggregated below the full category level for price cap purposes. We have already noted our view that the level of competition in markets served by dominant carriers should be taken into account in determining how to apply price cap requirements.[624] In the case of special access, although we have reached the tentative conclusion that a single basket (together with our proposed pricing band requirements) affords sufficient protection to special access customers, we seek comment regarding the desirability of establishing a limited number of service baskets below the full special access category level as a means of striking a proper balance between customer interests

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621 See generally 47 C.F.R. § 69.4. With the exception of limited pay telephone and information services, the elements in the LEC switched basket are but components of a single service which an IC must take in order to obtain switched access. By contrast, AT&T's switched basket would contain a variety of offerings, largely consisting of AT&T Tariffs F.C.C. Nos. 1 (Long Distance Message Telecommunications Service) and 2 (Wide Area Telecommunications Services), ranging from MTS to Megacom.

622 See our discussion of the relevance of competition in Section II.C.3.c, supra.

623 Thus, switched access services would comprise one basket, and special access services, together with LEC interexchange services, a second basket. Common line, as discussed in Section II.D, supra, would be held out of the cap until 1990.

624 See Section II.C.3.c, supra.

and carrier pricing flexibility. Disaggregation could be carried out by separating less competitive services from services which are subject to a greater degree of competition, thus lessening the risk of cross-subsidy and discrimination within any special access service basket.[625]

284. Baskets alone are insufficient in our view to protect ratepayers, however. We see merit in those comments that warn of the danger of wholly unconstrained cost-shifting that would be possible under a broad aggregate approach.[626] We share the concerns voiced by GSA and others,[627] that a large degree of aggregation would permit a carrier to make frequent and excessive rate changes. We believe that the rate churn and rate instability generated by such practices could severely undermine our goal of maximizing consumer welfare. We therefore propose to add individual rate element bands as additional protections.

285. By "band" we refer to the range within which a carrier may raise or lower any individual rate element in any year and still be entitled to streamlined review. With respect to rate reductions, a band also marks the range within which such reductions will be credited for purposes of measuring compliance with the aggregate cap.[628] Bands protect consumers against excessive changes during any annual price cap tariff filing period. They also provide some protection to the carrier's competitors from injurious pricing actions. When employed with a broadly formulated overall basket, bands moderate the flexibility a large aggregation of services affords a carrier and the concomitant potential for sudden, drastic price fluctuations. They also mitigate the carrier's ability to skew unduly its price reductions toward relatively more competitive services within the basket.[629] This approach is advocated by several commenters and already

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625 See DOJ Reply at 31-32.

626 See, e.g., MCI Comments at 17-18.

627 See GSA Comments at 8-9.

628 As we explain in detail in Section V, infra, all rate changes within or above a band are "credited" or counted in the Actual Price Index (API) for purposes of measuring compliance with the Price Cap Index (PCI). Thus, when we refer to the "credit zone" associated with a band we refer to the range of price levels above the band's lower limit which are credited in the API. Rate changes having the effect of bringing prices below the band are not within the "credit" zone and hence not counted in the carrier's API. Thus, because they are not credited, below-band rate reductions will not permit a carrier to increase the prices of other services correspondingly and still maintain compliance with the PCI.

employed by several states.[630] We tentatively select it over inflexible, supplemental caps on individual rates or narrowly defined groups of services, which certain parties urge.[631] Such caps might tend to lock in or encourage pricing inefficiencies.

286. Bands, unlike individual caps, would permit a carrier some freedom to adjust to new market or technological conditions, without undue pricing dislocations to consumers. They permit the carrier a "margin" for change. They thus potentially eliminate the need for detailed adjustments that, as US West suggests,[632] might be required for individual caps to avoid pricing distortions between substitutable services. On the other hand, the "credit zone" bounded on its lower end by a band's minimum limit, and would, more directly than an individual cap approach, limit a carrier's ability to make up reductions in the prices of competitive services by increasing other rates. We thus tentatively select a banding approach as a protection against rate instability and pricing which unduly disfavors consumers of less competitive services.

287. ALC proposes a 3 percent upper and lower band for the first year of the price cap plan and 5 percent for the following year.[633] For MTS, Cable & Wireless proposes a ceiling set at the MTS day rate and a floor at the Pro America rate. Both MCI and Cable & Wireless suggest 5 percent upper and lower bands for non-MTS offerings.[634] We believe that the 5

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629 Cf. DOJ Reply at 32 (arguing that if both competitive and non-competitive services are placed under the same cap, a regulated firm would drop the price of the competitive services and raise the price of the non-competitive service, while still satisfying the price cap constraint).

630 See, e.g., MCI Reply at 23. See also Status of Intrastate Competition and Regulation, State Telephone Regulation Report, Nov. 5, 1987, at 6-7; States Adopt Three Primary Approaches to Easing AT&T's Regulation, State Telephone Regulation Report, June 18, 1987, at 7-10; Letter from George Morlan, AT&T, to Chief, Industry Analysis Division, Common Carrier Bureau, FCC (Oct. 27, 1987) (AT&T intrastate regulatory flexibility status as of October 1, 1987; status of local exchange regulatory flexibility).

631 See, e.g., Ad Hoc Comments at 25-27 (recommending individual rate caps for certain services within four broad categories of service).

632 See US West Comments at 30.

633 See ALC Comments at 47.

634 Cable & Wireless Comments at 12-14; MCI Reply at 7.

percent upper and lower limit advocated most frequently by the parties provides a reasonable selection for a banding approach. As we explain in detail below,[635] the bands, after applying the Price Cap Index, would permit a 5 percent fluctuation above and below existing rates. This 10-point spread, as one commenter suggests, corresponds to that between AT&T's single unit (MTS) and volume discounted (Pro America) services.[636] In addition, the average change in AT&T's MTS service rates has historically and for the most part been within our proposed band. To the extent that our proposal might work a restraint on a tendency toward more dramatic price changes, such a restraint -- a minor one, based on our experience -- would further the public interest by preventing undesirable rate increases and rate churn. Our experience suggests that the bands we propose are reasonable in scope. We seek comment, including any additional data or empirical evidence, on whether our proposed bands are too loose or too stringent, and on any other banding approaches which parties would recommend in the alternative.

288. While full flexibility within the band is our preferred course, we also solicit comment on whether we should apply more focused pricing rules to MTS services used by residential and small business customers.[637] We invite interested parties to explore this option or any similar alternatives that would provide further safeguards to basic MTS users, and to comment on whether the benefits of such protections justify the additional constraints they place on a carriers' flexibility to adjust rates in response to changes in market or technological conditions.

289. Because the overarching objective of this proceeding is to safeguard and improve consumer welfare by ensuring that telephone rates are as reasonable as possible, we propose a refinement to our banding approach in the form of a "credit zone." This zone would permit price decreases

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635 See Section V.B, infra.

636 Cable & Wireless Comments at 13-14.

637 AT&T's analysis, for example, suggests that individual residential consumers, while they may have considerable service alternatives available, do not possess "buyer power" comparable to that of medium and large-size businesses. See generally AT&T Comments, App. A at 15-19 (testimony of Porter). AT&T states that "[b]usiness buyers generally possess significant negotiating strength, especially medium and large sized users." Id. at 18 (emphasis added). On the other hand, AT&T states that "[r]esidential customers, though neither so financially powerful nor so able to integrate backward as business customers, do possess considerable buyer power as a group." Id. at 18 (emphasis added).

below the 5 percent band, subject to certain conditions designed to protect against potential predation and to deter the shifting of costs from more competitive to less competitive services. We propose to permit price decreases greater than 5 percent, but not to credit them for the purpose of determining compliance with the overall aggregate cap. Thus, contrary to the fears of those who warn against creating price umbrellas for inefficient competitors,[638] our banding approach would permit rate reductions that benefit consumers, while ensuring that these reductions could not be compensated for by increases in other services. We seek comment on our proposal to permit, but not credit for purposes of measuring compliance with the Price Cap Index, price decreases below 5 percent. We invite parties to submit any data which they may possess in support of our particular formulation of the range we select for credit-no-credit purposes or of any alternative formulation of such a range which a party may suggest.

290. We do not intend for bands to provide a per se test for predation. Nevertheless, we believe that the manner in which they are formulated, together with existing safeguards such as the complaint process, the antitrust laws, geographic rate averaging, and existing market rules such as our ban on resale restrictions, will contribute to deterring any potential predatory activity. There is general agreement on the principle that, for predatory pricing to be successful, there must be a "reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered."[639] Even if a carrier could drive and keep competitors out, it would find itself severely handicapped in any effort to raise rates and thereby "make predation pay." This is because it could raise any particular tariff by only 5 percent per year (after allowance for movement in the PCI), an amount that is unlikely to permit recoupment of initially foregone profits. Nor could the carrier "bank" below-band reductions, since any excesses beyond the 5 percent band carry no credit against proposed tariff increases.

291. We agree with those opposing minimum duration requirements to check predation on the ground that these restrictions inhibit carrier flexibility[640] and also believe that they would entail the practical

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638 See, e.g., Ad Hoc Reply at 29-31.

639 Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 589 (1986), on remand sub nom. Japanese Products Antitrust Litigation, 807 F.2d 44 (3d Cir. 1986), cert. denied, -- U.S. --, 107 S.Ct. 1955 (1987); Northeastern Tel. v. AT&T, 651 F.2d 76, 89 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982).

640 See, e.g., Western Union Comments at 7; MCI Comments at 26-27.

difficulty of selecting an appropriate minimum period or periods capable of deterring anticompetitive conduct. Such requirements, moreover, only indirectly inhibit anticompetitive pricing. Bands, by contrast, would provide a more direct control over such activity. We decline to adopt an exclusive substantive standard for price floors[641] based on any particular economic theory because "[n]o consensus has yet been reached on the proper definition of predatory pricing in the antitrust context" by the judiciary[642] or in the economic literature.[643] Our "no credit zone" approach, moreover, has the salutary effect, lacking under price floors, of permitting consumers of the subject services to benefit from price decreases, thereby avoiding "inadvertently condemning...competition as an instance of predation" and "chill[ing] the very behavior the antitrust laws seek to promote."[644] Our proposed approach would help deter predation by protecting consumers of other services from having to subsidize the services being reduced. We seek comment on our tentative conclusion to require

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641 In Section IV.D, infra, we explain that carriers filing a below-band rate must nevertheless demonstrate that the proposed price covers their costs and we seek comment on an alternative proposal to require that this cost showing be based on average variable cost (AVC).

642 Cargill v. Monfort of Colorado, -- U.S. --, 107 S.Ct. 484, 492 n.12 (1986).

643 See, e.g., P. Areeda & D. Turner, Antitrust Law, (vol. III) §§ 711-719 (1978 ed.), 1982 Supp., §§710-719 (1982 ed.) (surveying case law and recommending formulation of particular rule); Zerbe & Cooper, An Empirical and Theoretical Analysis of Alternative Predation Rules, 61 Tex. L.R. 655, 655-57 687-99 (analyzing various alternative rules and finding one to be superior); Ordover & Saloner, Predation, Monopolization and Antitrust, Working Papers in Economics, The Hoover Institution, Stanford University 63-78 (Mar. 1987 rev.), to be published in R. Schmalensee and R.D. Willig (eds.), Handbook of Industrial Organization, (1988)(analyzing alternative models and concluding that no single "bright-line" rule suffices); Baumol, Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing," 89 Yale L. J. 1 (1979)(proposing rule); Joskow & Klevorick, A Framework for Analyzing Predatory Pricing Policy, 89 Yale L. J. 213 (1979)(analyzing various proposed rules); Ordover & Willig, An Economic Definition of Predation: Pricing and Product Innovation, 91 Yale L. J. 8 (1981)(proposing rules); R. Posner, Antitrust Law: An Economic Perspective, "Predatory Pricing," 184-196 (1976 ed.)(proposing rules and criticizing alternative tests); Williamson, Predatory Pricing: A Strategic and Welfare Analysis, 87 Yale L.J. 284 (1977)(analyzing and criticizing various tests).

644 Northeastern Tel. v. AT&T, 651 F.2d at 88.

banding of rates as an additional consumer protection and deterrent to any potential for anticompetitive pricing.

D. Tariff Filing and Review Procedures; Retention of Existing Rules

1. Summary of Notice

292. The Notice tentatively concluded that regardless of what form price cap regulation finally takes, dominant carriers should continue to file tariffs for their common carrier services.[645] We found that these tariff filings would be an important tool in assessing whether rates are just, reasonable, and nondiscriminatory. We tentatively decided, however, that rate filings at or below price cap maximums should be given streamlined regulatory treatment, such as reduced notice periods and different review criteria.[646]

293. The Notice proposed that a presumption of lawfulness for tariff review purposes would attach to below cap rates such that a substantial showing would be required to suspend the proposed rate.[647] We tentatively concluded that the presumption would not amount to a finding that the proposed rate was lawful, and that this Commission would continue to exercise our Section 204 investigatory powers, as well as our Section 208 complaint procedures with respect to streamlined tariffs. No changes were proposed to the procedures we have elected to implement either Section 204 or Section 208 or the burdens of proof that apply in initiating and resolving investigations and complaints.[648] The Notice also requested comment on the extent to which we should retain existing Commission rules and policies as part of a price cap system.[649]

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645 Notice, 2 FCC Rcd at 5214 (para. 40).

646 Id.

647 We found that such a presumption would be consistent with the Competitive Carrier decision. Notice, 2 FCC Rcd at 5215 (para. 41)(citing First Report, 85 FCC 2d 1 (1980)(designating as non-dominant specialized common carriers and resellers of terrestrial common carrier services operating in the contiguous 48 states and subjecting these carriers to streamlined regulation)).

648 Id. at 5215 (para. 41).

649 Id. at 5220-21 (paras. 72-74).

2. Pleadings

a. Rates At or Below Price Cap Maximums

294. In general, commenters assert that a price cap model should retain the basic regulatory tools of tariff filing requirements[650] and complaint procedures.[651] However, commenters differ substantially regarding the degree of regulatory scrutiny to which carriers should be subject under the new approach: some advocate protective measures for the benefit of ratepayers,[652] while others assert that a more pragmatic approach to regulatory scrutiny should be taken.[653]

295. Nearly all parties addressing this issue agree that tariff filings proposing below-cap, non-restructured rates should be subject to streamlined regulatory procedures as established in the Competitive Carrier proceedings.[654] However, a few commenters contend that full tariff scrutiny, including cost support requirements, will remain essential under price cap regulation, even for below-cap rates.[655] These parties assert that cost

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650 E.g., NYNEX Reply at 39-40; Pactel Reply at 33; Centel Reply at 17; GTOC Reply at 6, 14; United Reply at 8; USTA Reply at 10, 14; MCI Comments at 11; US Sprint Comments at 16; EDS Comments at 14; ADAPSO Reply at 13; IDCMA Reply at 34. See also GTOC Rules Submission, App. A at 3-5 (proposing tariff-filing procedures and standards for review).

651 E.g., Pactel Reply at 33; GTOC Reply at 6.

652 E.g., Ad Hoc Reply at 20 & n.11.

653 E.g., DOJ Reply at 30 ("Simplicity and practicality will better serve the public interest than will an attempt at theoretical perfection ....").

654 E.g., SWB Comments at 44-45; NYNEX Comments at 36-37; BellSouth Comments at 54; CBT Reply at 8; US West Comments at 35; GTOC Comments at 34-35; United Reply at 2; Centel Comments at 9; Contel Comments at 21; SNET Comments at 21-22; USTA Comments at 26-27; Comptel Comments at 24-25; Alabama PSC Comments at 4; NY EnerTel Comments at 27; US Sprint Rules Submission at 9. Cf. Ameritech Comments at 28 (urging this Commission to go beyond the streamlining permitted in the Competitive Carrier proceedings to allow carriers to file below-cap rates to be effective on one day's notice); DOJ Reply at 42-43 (asserting that advance notice requirements for price changes are anticompetitive, and proposing that tariffs be permitted to go into effect with little or no advance notice).

655 E.g., Cable & Wireless Comments at 9-10. Cf. MCI Reply at 54-55 (supports streamlined treatment of AT&T's below-cap filings, but asserts

support data will continue to be necessary to monitor rates for unfair or exploitative practices,[656] and that streamlining would improperly reverse the carrier's burden of establishing a tariff's legality.[657]

b. Above-Cap Rates

296. Most dominant carriers state that current cost support and tariff review procedures should apply to above-cap tariff filings,[658] although the USTA "consensus" LEC price cap plan makes clear that qualifying small carriers should be entitled to rely upon the less burdensome procedures set out in CC Docket 86-467.[659] A few LECs advocate use of more exacting standards for justifying above-cap rates, including the "substantial cause" test set out in RCA American Communications, 86 FCC 2d 1197, 1201-02 (1981).[660]

297. While a few of the remaining commenters support application of traditional tariff review criteria to above-cap rate filings,[661] most advocate far stricter standards. Several of these parties support use of the "substantial cause" standard.[662] Some propose automatic suspension of

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that such procedures may be inadequate with regard to the LECs, which face little competition).

656 Cable & Wireless Comments at 9.

657 Id. at 10.

658 AT&T Reply at 26-27; AT&T Rules Submission, Attachment A at 6; US West Reply at 19; GTOC Comments at 41-42; Contel Comments at 21; USTA Reply at 9-10; United Comments at 18.

659 USTA Comments at 23; USTA Reply at 9-10.

660 SNET Comments at 21-22 (stating that the "substantial cause" standard is appropriate, but contending that the type of data required under Section 61.38 of this Commission's Rules may not be necessary). See also SWB Comments at 31-32 (contending that carriers must establish that above-cap increases are in the public interest, and that petitions for such rate increases should be discouraged except at time of periodic review).

661 E.g., Comptel Comments at 24-25.

662 ALC Comments at 23-25; Colorado PUC Comments at 14; West Virginia Comments at 6. Cf. US Sprint Comments at 33 n.20 (contending that its proposed test, requiring a showing that this Commission erroneously set initial caps or that unforeseen circumstances have resulted in increased

above-cap filings,[663] or the automatic reimposition of rate-of-return regulation.[664] Some advocate requiring a showing of severe financial hardship,[665] or unforeseen circumstances.[666] At least one commenter urges this Commission to allow above-cap rates only upon a showing that unconstitutional confiscation of property would otherwise occur.[667]

c. Treatment of New and Restructured Services

298. Nearly all dominant carriers[668] and some other commenters[669] support streamlined tariff filing procedures for new services. Under most of these proposed procedures, new services would become effective on 14 days' notice and would, at a maximum, be required to satisfy the net revenue test.[670] However, several other commenters, led by the OCCs, would apply

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costs, is similar to the "substantial cause" standard). But see TCA Reply at 16 (criticizing the "substantial cause" standard as being too lenient, since factors meeting that standard allegedly could be integrated into annual adjustments).

663 Ad Hoc Comments at 41; CCTU Reply at 31; Florida PSC Comments at 2.

664 Citizens Comments at 15.

665 ANPA Reply at 7-8 (requiring a demonstration of compelling need); IDCMA Reply at 41-42 (requiring showing of extreme financial hardship); AARP Comments at 5 (permitting above-cap rates only in cases of emergency).

666 US Sprint Reply at 5-6; DOJ Reply at 40; NTIA Reply at 15.

667 TCA Reply at 15.

668 E.g., BellSouth Comments at 35; SWB Comments at 32-33; GTOC Comments at 34; USTA Reply, Attachment A at 16; USTA Rules Submission, Attachment A at 12; CBT Reply at 7.

669 E.g., Ad Hoc Reply, ETI Report at 43-44; TCA Reply at 9.

670 BellSouth Comments at 35; CBT Reply at 7 (proposes that new services be justified under the net revenue test); USTA Reply, Attachment A at 16 (net revenue test or cost support pursuant to Section 61.38 of this Commission's Rules, at the carrier's option); Ad Hoc Reply, ETI Report at 43-44; Ameritech Comments at 20 (both leaving initial rate levels to the carrier's discretion, subject to challenge). But see US West Comments at 41-43 (suggests that a new service to be accompanied by cost support establishing that the carrier's rates are within a zone bounded by the net revenue test on the lower end and twice the service's incremental costs on

full tariff scrutiny to new offerings to ensure that they are not existing services that have been repackaged to serve strategic purposes.[671] With the exception of one BOC,[672] commenters uniformly oppose applying streamlined treatment to restructured services, asserting, among other things, that unscrutinized restructuring could lead to discriminatory pricing[673] and effective self-deregulation.[674]

d. Continuation of Other Market Rules

299. Several commenting parties advocate a variety of additional regulatory requirements which should be retained under price cap regulation. Virtually all parties addressing the issue advocate retention of this Commission's prohibition of resale restrictions,[675] and most of these assert that the ban on such restrictions guards against discrimination.[676] Rochester notes that the continued availability of resale will thwart predation since entry or re-entry into a given market will be relatively simple and inexpensive,[677] while API submits that resale permits users to minimize above-cost pricing.[678]

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the upper end).

671 MCI Reply at 55; NTN Comments at 31.

672 Only BellSouth proposes that restructured rates be accorded relaxed tariff treatment. BellSouth Comments at 36-37.

673 E.g., GSA Comments at 9.

674 Comptel Comments at iii, 15-16.

675 See, e.g., USTA Comments at 28; Centel Reply at 17; MCI Reply at 37; US Sprint Comments at 16; MCI Reply at 37-39; ALC Comments at 48; Teltec Comments at 9-10; Clark Comments at 4-5; NTN Comments at 28; TCA Comments at 15-16; IDCMA Comments at 12; API Comments at 11; EDS Comments at 14-15.

676 E.g., Centel Reply at 17; EDS Comments at 14-15; TCA Comments at 15-16.

677 Rochester Comments at 15.

678 API Comments at 11.

300. Many commenters also urge that we preserve the market rules that call for non-discriminatory interconnection to interexchange facilities,[679] as well as those that prohibit bundling of basic and enhanced services.[680] In addition, US Sprint advocates retention of the filing requirements outlined in Private Line Rate Structure and Volume Discount Practices[681] and codified at Section 61.40 of this Commission's Rules, 47 C.F.R. § 61.40.[682] MCI recommends that this Commission should not only retain existing market rules but should actively monitor their operation to ensure maximum benefit to consumers and competing entities.[683]

301. Few parties address the impact of price cap regulation on Commission-mandated Open Network Architecture (ONA) and Comparably Efficient Interconnection (CEI) protections. Most agree that ONA and CEI procedures should be maintained under price caps,[684] although some question how these cost-based protections would be implemented in a price cap environment.[685] Pactel suggests that pricing rules may preserve the ONA and CEI requirements,[686] while ESPA is concerned that some of the BOCs will apply market prices rather than cost-based pricing to components of their ONA offerings.[687] ESPA contends that application of price caps in an area of frequent change such as ONA and CEI could lead to a "complete breakdown of effective regulation."[688] Alarm Industry notes that because specific services covered by the new protections have not yet been presented to this

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679 E.g., ALC Comments at 48; IDCMA Comments at 12; US Sprint Comments at 16.

680 MCI Reply at 37-39; EDS Comments at 14-15; IDCMA Comments at 12.

681 97 FCC 2d 923 (1984).

682 US Sprint Comments at 26-27.

683 MCI Reply at 37-39.

684 USTA Reply at 14; IBM Comments at 7-8; Alarm Industry Reply at 2-5; ADAPSO Reply at 13.

685 E.g., Alarm Industry Reply at 2-5.

686 Pactel Comments at 44.

687 ESPA Comments at 4.

688 Id.

Commission or the states, it is premature to conclude that price caps will not affect the ONA and CEI tariff structures.[689]

e. Complaint Procedures

302. There is general support in the comments for the continuation of this Commission's current complaint mechanism as a check against potential violations involving below-cap rates.[690] GSA recommends that we authorize a special, expedited complaint procedure for price caps, and that carriers should bear the burden of proof to demonstrate compliance with price cap regulation.[691]

3. Discussion

a. Rates At or Below Price Cap Maximums

303. We seek to establish tariff filing and review procedures that both afford carriers rate flexibility and preserve opportunities for review by this Commission and interested parties. These two concerns must be balanced in the context of routine filings to change price cap tariffs, and in annual price cap filings that reflect adjustments to the price cap index.[692] We tentatively conclude that striking a balance between flexibility and adequate review in the two types of below-cap tariff filings that will occur under price cap regulation requires different filing and review procedures.[693] Moreover, in devising tariff filing requirements for price cap carriers, we have recognized that proposed rates must be reviewed against the statutory standards of justness and reasonableness, as well as the requirement that rates not be unreasonably discriminatory. As we have previously stated, we do not intend to create a price cap plan that would

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689 Alarm Industry Reply at 5.

690 E.g., NYNEX Comments at 19; GTOC Comments at 33; USTA Reply at 9 & n.16; Alabama PSC Comments at 4.

691 GSA Comments at 12-13.

692 Adjustments to the price cap index are discussed in detail in Section V, infra.

693 Proposed tariffs that restructure a service offering, propose a new service, or propose out-of-band rates will require more extensive scrutiny than streamlined treatment would provide. The procedures accorded to these types of filings will be discussed below.

permit carriers to engage in unreasonable discrimination in price cap tariffs.[694]

i. Annual filings

304. We tentatively decide that the LECs' initial price cap tariffs should be filed December 30, 1988, with an effective date of April 1, 1989, for those exchange carriers electing price cap regulation. If AT&T elects price caps, its filing will occur February 16, 1989, also with an effective date of April 1, 1989. We have proposed a shorter notice period for AT&T, consistent with our current practice for access filings, because AT&T's price cap tariffs must reflect changes in access costs that can only be determined after the LECs file their proposed rates.

305. We have proposed these dates because we believe this is the earliest practicable time that price cap tariffs could be filed subsequent to the release of a final order in this proceeding. We note that, according to the current schedule, interstate rate changes will occur on December 1, 1988, January 1, 1989, and April 1, 1989.[695] The Commission is currently evaluating what steps, if any, are needed to coordinate this schedule.

306. After the initial filing, carriers will be required to update their price cap indices each year. As we will discuss in Section V, infra, we believe that price caps must be adjusted on a periodic basis to reflect the inflationary changes faced by the carriers, changes in productivity, and changes in certain costs that are beyond a carrier's control. These cost-based adjustments will ensure that rates remain in the zone of reasonableness and are neither so low as to prevent the carrier from attracting sufficient capital to conduct its business, nor so unreasonably high as to burden ratepayers unfairly. Once the initial set of price cap tariffs takes effect, we propose that the annual price cap tariffs take

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694 See Section III.C, supra.

695 The December 1, 1988 filing implements a 60-cent increase in End User Common Line charges, and will under Commission policy thereby result in a corresponding decrease in Carrier Common Line Charges. See Section 69.203(a) of this Commission's Rules, 47 C.F.R. §69.203(a). Annual 1989 access tariffs are presently scheduled to become effective on January 1, 1989. See Section 69.3(a) of this Commission's Rules, 47 C.F.R. §69.3(a). On April 1, 1990, carriers will implement the remaining 30-cent increase in End User Common Line, as well as initiate Universal Service Fund and Lifeline Assistance elements, and may elect to file depooled Carrier Common Line rates. See Sections 69.203(a), 69.5(d) and 69.612 of this Commission's Rules, 47 C.F.R. §§ 69.203(a), 69.5(d) and 69.612, respectively.

effect on July 1 of each year, after a 90-day notice period for the LECs and a 45-day notice period for AT&T.

307. Each year as adjustments are calculated, the price cap index will fluctuate according to changes in the various cost factors included in the adjustment formula provided in Section V, infra. As part of the annual filing, therefore, carriers must demonstrate that they have made the adjustments to their indices according to the procedures required by this Commission and that the calculations are correct. Furthermore, carriers must demonstrate that their actual prices do not exceed the price cap index.[696] Carriers must also demonstrate that their actual prices are within the applicable pricing bands. Carriers may elect to amend rate levels as part of their annual filing, although they are not required to do so unless rate level changes are needed to keep the actual price index below the price cap index or to ensure that prices are within the applicable bands.[697]

ii. Rate level changes

308. Except for the annual filing to incorporate adjustments to the price cap index, we propose that carriers electing price cap regulation shall receive streamlined treatment of tariffs that propose to change rate levels so long as the resulting actual price index is less than or equal to the price cap index and rates fall within the applicable pricing bands. Only tariffs that meet these requirements shall be presumed lawful for tariff review purposes with respect to both Section 201 and Section 202. We tentatively conclude that we should rely on tariff filing and review procedures similar to those streamlined tariff review procedures that we employ for some non-dominant carriers.[698] Although the reasons for employing

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696 We discuss the methods by which carriers will demonstrate compliance with price cap calculation requirements in Section V, infra.

697 Implicit in our proposal is the requirement that the price cap index acts as the upper limit on the actual price index at all times. Thus, a carrier whose rates for a basket of services have been less than the price cap index cannot later elevate its rates for the basket above the price cap limits such that the actual price index, averaged over a period of time, equals the price cap maximum.

698 See Competitive Carrier, First Report and Order, 85 FCC 2d 1 (1980), Second Report and Order, 91 FCC 2d 59 (1982), recon. denied, 93 FCC 2d 54 (1983), Third Report and Order, 48 Fed. Reg. 46791 (Oct. 14, 1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fifth Report and Order, 98 FCC 2d 1191 (1984), Sixth Report and Order, 99 FCC 2d 1020 (1985), rev'd & remanded sub nom. MCI Telecommunications v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

streamlining in a price cap environment for dominant carriers are different from the reasons elaborated in Competitive Carrier with regard to non-dominant carriers,[699] we believe that similar procedures applied in a price cap setting will provide sufficient assurance that rates are not unjust or unreasonable, given the incentives created by price caps to drive rates into the zone of reasonableness. In addition, we believe that our streamlining approach does not violate our statutory duty to guard against unreasonable discrimination. As we stated in Section III, supra, rate level changes within the cap and band constraints are unlikely to raise issues of unreasonable discrimination.[700] Accordingly, we propose that rate level changes may be filed on 14 days' notice, that they shall be presumed lawful, and that they must be supported by calculations necessary to demonstrate that the proposed prices are at or below the levels mandated by the price cap index and fall within the pricing bands.

309. Consistent with our view that within-band rates are presumptively lawful for tariff review purposes, we propose to amend Section 1.773 of this Commission's Rules to employ a four-part test in evaluating petitioners' requests to suspend within-cap and within-band price cap rates. The test we propose to use is similar to the one used by the courts to determine whether to grant a stay or issue a preliminary injunction,[701] and is similar to the one we employ in evaluating whether to suspend the rates of non-dominant carriers.[702] To make a successful suspension showing for a price cap tariff that changes rate levels only (and that has demonstrated that the proposed rate levels are within the applicable bands and are at or below the levels established by the carrier's price cap index), a petitioner would have to demonstrate the following: (1)

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699 Compare Section II.C, supra, with Competitive Carrier, First Report and Order, 85 FCC 2d 1, 37-38 (1980). In Competitive Carrier, we found that streamlining was warranted due to the presence of competition and the absence of market power in the provision of service by non-dominant carriers. Under price cap regulation, streamlining is warranted due to the limitations placed on carrier pricing by price caps and pricing bands.

700 See Section III, supra. Indeed, changes to tariffs other than rate level changes are subject to our non-streamlined filing requirements for restructured offerings, discussed below.

701 Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958), modified, Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977).

702 See Competitive Carrier, First Report and Order, 85 FCC 2d 1, 37-38 (1980).

a high probability that the tariff would be found unlawful under Section 201 or Section 202 of the Act (or under any other provision of the Act or any other statutory or other legal requirement) after investigation; (2) suspension would not substantially harm other interested parties; (3) irreparable injury would result if suspension does not issue; and (4) the suspension would not otherwise be contrary to the public interest.[703] We believe that such a test for suspension[704] is warranted because within-cap rates are presumed to fall within the zone of reasonableness. Carriers should therefore have an expectation that proposed rate level changes should become effective, absent some other flaw in the tariff proposal that renders the rates unlawful.

310. Rate level changes that result in rates that are below the pricing bands potentially raise competitive concerns and therefore require different tariff treatment.[705] As a general matter, firms have no incentive to engage in predatory behavior unless they can recoup current losses on a service with supra-competitive profits in the future or on other existing non-competitive services.[706] As proposed, the operation of the price cap mechanism makes it difficult for a carrier to recoup current losses on a predatorily priced service, whether through current supra-competitive pricing of non-competitive services, or through future rate increases for the service that is currently generating the loss, due to the cap and band limitations on rates. Nevertheless, in a regulatory scheme of carrier-initiated tariff filings, it is conceivable that carriers will file rate level changes below those permitted under our banding requirements. Due to our concern regarding the competitive consequences of such rates, we propose that below-band rates be filed on 45 days' notice, with an accompanying showing that the proposed rates cover the cost of providing

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703 See Section III.C, supra, for a discussion of our legal authority to administer a "no-suspension" zone.

704 Petitioners, of course, also could seek rejection of any such tariff filing by asserting that the particular filing involved is patently unlawful on its face.

705 We must, of course, consider relevant antitrust policies as part of our inquiry into where the public interest lies. However, such policies are but one of many factors pertinent to our public interest determination, and need not be conclusive. See United States v. FCC, 652 F.2d 72, 82 (D.C. Cir. 1980)(en banc).

706 See Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 590-91 (1986). See also Northeastern Tel. v. AT&T, 651 F.2d 76, 89 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982).

the service, and are otherwise just, reasonable, and nondiscriminatory. The 45-day notice period is identical to the notice period in effect today for dominant carriers that propose to lower their rates. Thus, dominant carriers, this Commission, and interested parties remain in the same procedural posture as they are today.[707]

311. Our proposed standard for below-band filings does not specify a particular economic standard by which to measure costs. As an alternative to our proposal, we also seek comment regarding whether we should specify a particular cost showing that carriers would be required to meet in filing below-band rates. We note that beyond the general Communications Act obligation that rates be just and reasonable, there is no specific statutory standard by which we are to judge whether rates are predatory. Nor have the courts reached a consensus regarding the exact definition of predatory pricing.[708] The differing approaches to predatory pricing taken by the federal circuit courts, however, generally share the recognition that a firm's average variable cost plays a key role in determining whether prices are predatory.[709] We therefore seek comment on the advantages of adopting a particular cost showing, such as average variable cost, for the purposes of deciding whether below-band rates are predatory, i.e., that the proposed rates are not violative of Section 202 or Section 201.

312. We are particularly interested in evaluating the test for predation adopted by the United States Court of Appeals for the Ninth

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707 Of course, challenges to the proposed tariffs can continue to be made under Section 201 and Section 202 of the Communications Act, 47 U.S.C. §§ 201, 202.

708 See Cargill v. Monfort of Colorado, 107 S.Ct. 484, 493 n.12 (1986).

709 See, e.g., William Inglis & Sons Baking v. ITT Continental Baking, 668 F.2d 1014 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982)(establishing that plaintiffs in antitrust cases are subject to heavier burdens of proof if the firm's prices are above average variable cost); Instructional Systems Dev. v. Aetna Cas. & Sur., 817 F.2d 639 (10th Cir. 1987)(finding that relationship between price and marginal cost or average variable cost is a "valuable indicator" of predatory pricing); Barry Wright v. ITT Grinnell, 724 F.2d 227 (1st Cir. 1983)(discussing the use of incremental cost standards, rather than intent, to determine if a price is predatory); MCI Communications v. AT&T, 708 F.2d 1081 (7th Cir. 1983), cert. denied, 464 U.S. 891 (adopting a long-run incremental cost standard and citing with approval marginal cost standards adopted by other circuits).

Circuit.[710] Under this test, a carrier would be required to make a demonstration that its proposed rates were above average variable cost. Upon such a showing, rates would be presumed not predatory. Petitioners would be afforded an opportunity to demonstrate other factors justifying a finding of predation. We seek comment on this alternative standard.

313. In addition to the above-described tariff requirements, we propose one additional requirement for below-band rates. Tariffs proposing a below-band rate require the calculation of an actual price index. In making such a calculation, we propose to credit only the first 5 percent movement in rates toward the actual price index.[711] This proposal, together with our more stringent tariff filing requirements for out-of-band rates, ensures that carriers will not be able to manipulate certain rates dramatically downward while manipulating other rates dramatically upward, a result we intend to avoid.

314. Proposed rate increases that are above our banding limitations, but do not drive the actual price index above the price cap index, present issues of rate increase burdens and rate churn and compel different tariff review treatment. The pricing bands that we propose have been designed to provide carriers with flexibility in making pricing decisions. They are also intended to operate as percentage limitations in annual price movements, thereby limiting a carrier's ability to engage in drastic price changes to the detriment of ratepayers.[712] We therefore propose that above-band tariffs be permitted to take effect only where a carrier can demonstrate substantial cause for an increase above 5 percent.

315. The substantial cause test has long been the standard that carriers must meet to change long-term tariffs in a manner that would affect adversely ratepayers' interests.[713] In adopting the substantial cause standard, our concern has been to balance the need for carriers to realign their tariff obligations in the face of changed circumstances with the

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710 William Inglis & Sons Baking v. ITT Continental Baking, 668 F.2d 1014 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982); Transamerica Computer v. IBM, 698 F.2d 1377 (9th Cir. 1983), cert. denied, 464 U.S. 955.

711 The methodology for implementing this rule is discussed in Section V.B, infra.

712 See Section IV.C, supra.

713 See RCA American Communications, 86 FCC 2d 1197 (1981)(holding that under a substantial cause standard, RCA American failed to justify changes to its long-term domestic satellite service tariff).

customers' need for stability. The same types of considerations are present in the price cap context. Under our proposal, price cap carriers will have voluntarily entered into a regulatory system that guarantees streamlined treatment of rate level changes provided that those changes fall within a set of pricing guidelines. Ratepayers have the expectation that rates may vary within the applicable rate bands and subject to the price cap index, since below-cap and within-band rates are presumed lawful. In proposing an above-band rate, however, a carrier is reflecting its decision that our streamlined price cap rules no longer result in rates that are just and reasonable. We believe carriers should be required to explain why our banding requirements should not apply. In our view, a substantial cause burden on the carrier will generate the explanation we seek when an above-band rate is filed.

316. Due to the nature of the demonstration, we propose that above-band filings that do not raise the actual price index above the price cap index must be filed on 90 days' notice. We propose to employ the full notice period authorized under statute to ensure that this Commission and our staff, as well as interested parties, have an opportunity to evaluate the support information filed to satisfy our substantial cause standard. Furthermore, we anticipate that, despite a 90-day notice period, there will be a high probability that tariffs proposing above-band rates will be suspended, since each proposal must be examined for conformance with our requirements.

317. Although a substantial cause standard will necessarily generate a more traditional cost-based justification of proposed rates, an above-band filing that does not cause the actual price index to rise above the price cap index would not result in reversion to rate-of-return regulation for the carrier filing the above-band rate. In the event an above-band rate becomes effective that does not pierce the cap, carriers will simply make their index calculations as before. No additional upward movement in rates will be permitted until the next annual review, unless the carrier can again demonstrate substantial cause or meet the requirements we propose for justifying an above-cap rate.

b. Above-Cap Rates

318. Unlike the streamlined tariff filing and review procedures applicable to rates within the no-suspension zone, we propose that an above-cap tariff must be filed on 90 days' notice and be accompanied by cost support data establishing that the proposed rates are just and reasonable. As is the case in above-band filings, the 90-day notice period is intended to provide this Commission, as well as interested parties, with an opportunity to evaluate the cost support information that we shall require to justify above-cap rates. Nevertheless, given the comprehensive nature of the information required to afford an opportunity to evaluate above-cap filings meaningfully, and the complexity of determining if proposed rates

are just, reasonable, and not unreasonably discriminatory, above-cap rates will generally be suspended.

319. In making the required cost support showing regarding such rates, a carrier must file cost data covering each rate in the basket for the most recent four years under price caps,[714] and a detailed explanation of the carrier's cost allocation methodology for allocating costs to each ratable element. This comprehensive, systematic cost showing is necessary because all rates within a basket are interrelated under the price cap formula. Moreover, to avoid carriers benefitting from imprudent business practices in their operation under a price cap system or charging excessive rates, this Commission would need data covering a multi-year period in order to evaluate a claim by the filing carrier that the proposed rate increase is just and reasonable, e.g., that it is necessary to avoid unlawful confiscation of property, or necessary to ensure acceptable service quality. Without such a showing, it would be difficult to determine whether the costs driving the rate increase were prudently incurred. In evaluating these data, we will be mindful of the fact that a major purpose of the price cap regulatory scheme is to benefit consumers. Accordingly, and in light of the flexibility given to carriers under the price cap scheme with regard to below-cap rates, we intend carefully to scrutinize above-cap rates to ensure that consumer interests are protected to the maximum extent possible, consistent of course with meeting "the minimal requirements for protection of investors" against confiscation[715] that inhere in the statutory standard of just and reasonable rates.

320. Although several commenters have advocated that we employ a substantial cause standard in evaluating above-cap filings, we do not believe that such a standard would produce the more exhaustive cost justification that we consider necessary to justify an above-cap filing. Unlike tariffs that propose rates above the band but do not pierce the cap, above-cap rates must be judged in the context of the carrier's pricing decisions for all services within the basket. The comprehensive cost showing that we are requiring will ensure that we have the information available to evaluate rates for the entire basket. We therefore tentatively reject suggestions to employ a substantial cause test for above-cap filings.

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714 Above-cap filings made before the fourth year of the price cap program need only be accompanied by data for the basket since the inception of price caps.

715 Jersey Cent. Power & Light v. FERC, 810 F.2d 1168, 1177 (D.C. Cir. 1987) (quoting Washington Gas Light v. Baker, 188 F.2d 11, 15 (D.C. Cir. 1950), cert. denied, 340 U.S. 952 (1951)).

321. We are not proposing, as part of this detailed cost showing for above-cap rates, that carriers regulated under price caps would revert to rate-of-return regulation in the event an above-cap rate is filed or permitted to take effect. We propose that, if the above-cap rate is allowed to become effective, the above-cap rate would require an adjustment to the price cap index. We propose that a carrier's price cap index for the relevant basket be increased to the level of the actual price index resulting from the price increase. The carrier would thereafter continue to be regulated under the price cap system.

c. New and Restructured Services

322. As we have previously discussed, new services should initially be offered outside of price cap regulation and should be incorporated into price caps no later than the first annual filing after the new service has been offered during a preceding base year. We tentatively conclude that carriers seeking to introduce a new service must demonstrate that the new service meets a "net revenue" test similar to that articulated in the Optional Calling Plan Order.[716] We believe that the net revenue test will ensure that rates for new services will fall within the zone of reasonableness. We propose to employ the net revenue test for new services because we have determined, based upon our experience in administering the standard in other contexts, that it represents a well-defined methodology for ensuring that rates cover costs. In addition, new services must meet the requirements of the Act and Commission policies, such as prohibitions against resale restrictions and the unbundling of service elements. We tentatively conclude that this type of review, together with our decision to bring new services within price caps, comports with our mandate under Section 7 of the Act[717] to encourage the provision of new services. In order to ensure that proposed new service tariffs afford adequate opportunity for this type of review, we propose that they be filed on 45 days' notice. We decline to adopt the approach of those commenters who advocate total pricing freedom for new services. We tentatively conclude that the Act, as well as the proposed mechanics of our price cap system, compel us to ensure that rates for new services are just and reasonable. We believe that dominant carriers must continue to file tariffs for new services and that those tariffs should be subject to our review.

323. The net revenue test we are proposing is a modified version of the net revenue test applied in the Optional Calling Plan decision. Should AT&T elect price caps, the net revenue test we are proposing would

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716 50 Fed. Reg. 42,945 (Oct. 23, 1985), 59 R.R.2d 70 (1985).

717 47 U.S.C. § 157.

replace the net revenue test articulated in the Optional Calling Plan decision for new service filings made by AT&T.[718] We propose that a new service must generate a net revenue increase in the following time periods: within the lesser of a 24-month period after an annual price cap tariff becomes effective that incorporates the new service or 36 months from the date the new service becomes effective.[719]

324. We also propose that the net revenue increase be measured against revenues generated from services in the same price cap basket, and should be calculated based on present value. We propose to employ the rule that unbundled elements of a new service should also meet the net revenue test. We also tentatively find that any decision to permit a new service tariff to become effective will require us to examine the same type of cost support data that we have required under the Optional Calling Plan Order, as well as information concerning how the carrier involved is allocating joint costs between the services. We also will require quarterly reporting for new services, as we did in the Optional Calling Plan decision.

325. In contrast to new services that represent an additional measure of choice for consumers, restructured offerings are those that restructure an existing method of charging or provisioning a service, replacing it with a new method of charging or provisioning.[720] We have

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718 The Optional Calling Plan Order also applied to the BOCs' limited provision of interexchange service. To the extent that the BOCs elect price caps, the modified version of the net revenue test we are proposing in this Further Notice would apply both to their access services and to their interexchange services.

719 See Optional Calling Plan Order, 59 R.R.2d at 82-83. The Optional Calling Plan decision sets forth a net revenue test that relies on a forecast increase in demand reflected in the annual access filing. Our price cap proposal, however, seeks to employ historical experience to the greatest extent possible, and the demand levels reflected in the annual price cap filing shall be base year demand levels. For the purpose of satisfying the net revenue test under price caps, however, we recognize that carriers must utilize forecast demand to make their net revenue showing.

720 The distinction we propose to draw between new and restructured offerings turns on whether the offering provides the customer with a service, or a version of a service, that is in addition to offerings already available. If a proposed offering increases a customer's options, the offering is classified as new. If a tariff filing represents a change in an existing method of charging or provisioning (through restructuring, changing a term or condition, or adding language), without increasing a customer's range of alternatives, then the filing will be considered a restructuring.

previously discussed our tentative decision to keep restructured services within our price cap requirements. We believe that restructured services should be filed on 45 days' notice and carriers proposing such services should be required to demonstrate that the restructuring will not result in actual prices that fall outside price cap requirements. Our decision to place tariff structure changes on 45 days' notice amounts to nothing more than a retention of our current tariffing requirements for restructured offerings. Tariff restructuring potentially raises issues of discrimination between customers or classes of customers, whereas rate level changes that comply with our proposed price cap requirements are less likely to present such concerns. Major restructuring raises issues that the price cap plan we are proposing does not address. Accordingly, we believe that changes other than rate level changes must continue to be reviewed under currently applicable substantive requirements, such as the requirements established in Section 201 and Section 202, and under existing notice periods for dominant carriers.[721]

326. A potential question with regard to our proposed treatment of new and restructured services is whether carriers would be in a position to force customer migration to purportedly new services by degrading the quality or provisioning of related existing services. By stopping short of "abandoning" the existing service, the carrier's alternative offering would be treated as a new service rather than a restructured service under our proposal and thus initially would not be subject to our price cap requirements. From the perspective of the customer, however, the degraded quality or provisioning of the existing service might be tantamount to the discontinuance of that service. We seek comment on whether such carrier incentives and opportunities might be engendered by our proposed treatment of new and restructured services, and on the nature of any requirements or protections which could be established as part of the price cap plan to guard against any such degradation of existing services.

327. We also propose to use our existing notice periods to review tariff filings that correct tariffs or represent one of the tariff changes contemplated in Section 61.58(c)(1)(ii) and Section 61.58(c)(1)(iii).[722]

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721 Differing treatment of rate level changes from rate structure changes is a technique we have relied on in other contexts to expedite our tariff review processes. See Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It with Part 36, Jurisdictional Separations Procedures, 2 FCC Rcd 6447, 6458-59 (1987)(limiting annual access filings to rate level changes only so as to reduce the volume and complexity of the support information).

722 Our proposed rule amendments redesignate Section 61.58(c) as Section

Pursuant to existing rules, corrections may be filed on 3 days' notice.[723] Other changes named in Section 61.58(c)(1)(ii) and Section 61.58(c)(1)(iii) may be filed on 15 days' notice. We also tentatively find that tariffs proposing both rate level changes (that will not result in actual prices that fall outside price caps) and restructuring should be filed on 45 days' notice and be subject to the same tariff review criteria as we use for restructured tariffs.[724]

.d. Continuation of Other Market Rules

328. Price caps are intended to establish a method of regulation that will provide incentives to carriers to become increasingly efficient and to provide new and innovative services. We do not intend, as part of our proposal, to disturb existing policies and rules that foster competition and prevent discrimination in the provision of telecommunications services. These policies, such as open entry, equal access, resale and shared use, interconnection, unbundling of tariffed services, and non-structural safeguards for the joint provision of regulated and nonregulated activities, shall work in tandem with price cap regulation to spur dominant carriers on to greater productivity levels than previously achieved, while providing assurances that competition in the provision of telecommunications services will continue. We are not proposing, therefore, any changes in our market rules in this proceeding.

329. We also agree that ONA and CEI protections against discrimination must be maintained under price caps. The ONA and CEI requirements guard against discrimination in the prices that dominant carriers charge for network access. The ONA regime requires that the BOCs make available unbundled Basic Service Elements (BSEs) that will support all enhanced services and that all enhanced service providers may use on identical terms. Similarly, CEI mandates that AT&T offer its competitors the same basic services that it uses in its own enhanced service operations.

61.58(d). See Appendix E. The references in the text are to the current provisions of Section 61.58.

723 Section 61.58(a)(3) of this Commission's Rules.

724 See Section 61.58(a)(1) of this Commission's Rules ("If a tariff filing proposes changes governed by more than one of the notice periods listed [in this section], the longest notice period will apply.").

330. Concerns have been raised, however, as to whether the BOCs, and to a lesser extent AT&T, will have an increased opportunity under price cap regulation to overprice their BSEs and thereby price their own enhanced services at anticompetitive levels. ONA protections dictate that when the BOCs themselves operate as enhanced service providers, they must pay the generally available tariffed rates for BSEs. Such rates, however, can include distance-sensitive elements that reflect "short-wire" efficiencies, which a BOC may realize by physically co-locating or integrating its basic and enhanced service operations. As a result, a BOC's enhanced service operation may receive a BSE offering at a different price from its competitors. The streamlined tariffs that will be permissible under our proposed price cap system of regulation will display such pricing differentials. Even if the tariffs containing such differentials are in the no-suspension zone, such tariffs would still be subject to ONA pricing requirements.

331. Although we are open to the use of pricing rules to implement our Computer III policies, we believe that concerns as to discriminatory or anticompetitive pricing of BSEs will continue to be addressed in the tariff review process.[725] Even within the "no-suspension" zone created by our price cap approach, a discriminatory or anticompetitive pricing provision pertaining to BSEs may lead to deferral of the tariff's effective date to permit full statutory notice, suspension of the tariff, or possibly rejection.[726] Furthermore, this Commission may determine that economic data in the carrier's possession which are necessary to substantiate the claims in issue should be placed in the public file. To apprise opponents adequately of BSE revisions otherwise subject to streamlined regulation, we may also require that carriers specifically note BSE changes in their transmittals as well as on actual tariff pages.

e. Complaint Procedures

332. Only one party has argued that Section 208 complaint procedures should be amended for price cap tariffs and that carriers should bear the burden of demonstrating compliance with price cap requirements.[727]

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725 See Computer III, Phase I, Further Reconsideration Order, 3 FCC Rcd 1135, 1141 & n.72 (1988).

726 While petitioners must demonstrate that the proposed tariff should be suspended under a four-part test similar to that used for preliminary injunctions, this Commission may, on our own initiative, suspend rate level changes involving BSEs if we believe the proposed rates may be discriminatory or anticompetitive.

727 See GSA Comments at 12-13.

As we discussed in Section III, supra, we tentatively decide to retain our existing complaint procedures.

V. ADJUSTMENTS TO CAPPED RATES

A. Selecting Adjustment Factors

1. General Considerations

a. Summary of Notice

333. In the Notice, we recognized the need for ongoing adjustments to price caps so that economic changes beyond a carrier's control do not result in rates that are outside of the zone of reasonableness.[728] We proposed that adjustment factors be readily quantifiable, and that they include changes to the purchasing power of money and other exogenous factors.[729] We also proposed that price caps be adjusted for changes in productivity in order to pass on to consumers anticipated increases in productivity and the resulting reductions in carrier costs. We found that adjustments to price caps would continue to tie the lawfulness of rates to costs because the adjustment factors are based on changes to a carrier's cost of operation or to the industry's cost of operation.[730]

b. Pleadings

334. Most commenters assert generally that any price cap scheme should have an adjustment mechanism to reflect changes in inflation, productivity, and other factors significantly affecting the carriers' cost of doing business.[731] The parties propose adoption of a variety of different adjustment factors, but most agree in principle that such factors

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728 Notice, 2 FCC Rcd at 5218 (para. 59).

729 Id. at 5218-19 (para. 62).

730 Id.

731 E.g., Pactel Comments at 5 & n.3; Pactel Reply at 6, 24; NYNEX Comments, App. B at 19 (testimony of Levin); BellSouth Reply at 2; NYNEX Comments at 31-32; CBT Reply at 6-7; USTA Reply, Attachment A at 5-6, 9-16; USTA Rules Submission, Attachment A at 9-11; Comptel Comments at 20-21; TCA Comments at 9; CCIA Comments at 11-12; Florida PSC Comments at 7-8; West Virginia Comments at 8; AT&T Comments at 43, 57; SWB Comments at 26-27, 44; US West Comments at 39; Centel Comments at ii, 3, 12; Centel Reply at 20; SNET Comments at 16-19; Bell Atlantic Comments, Attachment I at 40.

should be simple,[732] based on readily available data,[733] generally recognized as reliable,[734] and beyond the carriers' control.[735] Most also agree that selecting the proper adjustment factors is critical to ensuring that price caps will at once provide consumer benefits and the desired carrier incentives.[736]

335. Other parties argue that adjustment to price caps ought to be minimized. These parties argue that either the various adjustments proposed in the Notice will be self-cancelling, that the formulation of price cap adjustments should await an initial review period, or that no adjustments to price caps be made at all.[737]

c. Discussion

336. We tentatively find that price cap levels must be permitted to rise and fall according to an index of the cost of factors of production (i.e., inflation), anticipated changes in carrier productivity, and changes in costs due to changes in laws, regulations, or other factors that are beyond a carrier's control.[738] Recognition of changing costs in adjustments

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732 BellSouth Comments at 24; API Comments at 19; Ad Hoc Reply, ETI Report at 26.

733 NYNEX Comments at 31-32; Ad Hoc Reply, ETI Report at 26.

734 E.g., NYNEX Comments at 31-32.

735 E.g., NYNEX Comments at 31-32; Ad Hoc Reply, ETI Report at 26. TCA explains that unless an adjustment factor is beyond a carrier's control, price caps would not encourage cost containment, nor discourage the artificial incentives to invest in unneeded facilities. TCA Comments at 9.

736 E.g., BellSouth Comments at 24; US Sprint Comments at 36; API Comments at 19.

737 Maryland PC Comments at 15-16; Cable & Wireless Comments at 17-18; Virginia Comments at 6; Arizona Comments at 3; ALC Comments at 51; ALC Reply at 39-40.

738 In this Further Notice, we refer in various places to "exogenous costs" or "exogenous factors." By these terms we mean changes in costs that would be incurred by a carrier due to changes in laws, regulations, or rules, or due to other administrative, legislative, or judicial changes beyond a carrier's control. By contrast, neither a carrier's total tax liability, nor changes in that liability due to ordinary financial fluctuations, constitutes an "exogenous cost" as that term is used in this

to price caps is necessary to ensure that rates are not unreasonable from both the carrier's and ratepayer's perspective. Without such adjustments, a change in the tax laws, separations, or access charges, for example, could render the capped rate unreasonably high or unreasonably low. We have previously discussed our statutory obligation to ensure that rates fall within the zone of reasonableness, and we will not repeat our analysis here.[739] We therefore tentatively find that changes in certain exogenous costs and the rate of inflation experienced by carriers must trigger adjustments to price caps. We also tentatively find that price cap levels must be adjusted at periodic intervals to reflect the ever-decreasing cost of providing telephone service that has resulted from ever-increasing productivity in the industry.[740] In addition, a productivity adjustment is essential to our goals of generating greater efficiency in the industry by stimulating carriers to increase productivity, and of sharing productivity gains with ratepayers.

337. We propose that the adjustment factors be combined to produce a price cap index that will be applied to carriers' rates on a periodic basis. The price cap index will determine whether price cap levels shall be raised or lowered, and will, along with other protections we are proposing in this Further Notice, ensure that rates remain linked to underlying costs. The following formula illustrates the method we propose to use to determine adjustments to the price cap index:

$$\text{Proportional change to the price cap index} = w(I - X)/100 + \Delta Y/R + \Delta Z/R$$

where I = the percent change in the cost of factors of production,

X = the percent increase in productivity,

w = the fraction of base period gross revenues represented by non-access costs net of ΔZ (as defined below), divided by base period gross revenues,

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Further Notice. Rather, a change in tax liability resulting from a change in tax law, and measured at a constant base-period level of operation, is an "exogenous cost change."

739 See Section III, supra.

740 See Section V.A.3, infra.

ΔY = the dollar magnitude of any change in access charges for the upcoming tariff year, evaluated at base period demand,

ΔZ = the dollar magnitude of any other exogenous cost changes, and

R = base period gross revenues.

While the "I" and "X" factors remain constant, different Y and Z cost changes will be applied to each basket of services, thereby creating different indices for each basket. We tentatively conclude that use of this simple formula will produce rates within the zone of reasonableness, while providing incentives for carriers to become increasingly productive.

338. We do not agree with the argument that adjustment factors will produce self-cancelling results and therefore should not be adopted. Indeed, an examination of the factors that we propose be used to adjust the price cap index reveals that our price cap formula will not net to zero, based on recent trends in the factors selected. We tentatively conclude, therefore, that we must identify adjustment factors that will produce rates within the zone of reasonableness.

2. Cost of Purchasing Factors of Production

a. Summary of Notice

339. The Notice proposed that one of the adjustment factors in price cap levels should be changes in the purchasing power of money.[741] We also solicited comment regarding how to measure this proposed adjustment factor, and suggested that either the Consumer Price Index (CPI) or the Producer Price Index (PPI) could serve as a measure of inflation. We requested comment on the advantages and disadvantages of each index. We also sought comment regarding how to measure the rate of change in the inflation index we select.[742]

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741 Notice, 2 FCC Rcd at 5218 (para. 60).

742 Id.

b. Pleadings

340. Many commenting parties support the adoption of some type of adjustment factor to account for changes in the purchasing power of money.[743] AT&T,[744] the vast majority of commenting LECs,[745] and some OCCs[746] support use of the Bureau of Labor Statistics' (BLS) Consumer Price Index (CPI) as a price cap inflation adjustor. Proponents claim, among other things, that the CPI is generally accepted,[747] easily understood,[748] readily available on a timely basis,[749] and immune to manipulation by carrier actions.[750] In addition, they assert that of the possible indices meeting the above criteria, the CPI is the most accurate indicator of

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743 But see Citizens Comments at 14-15 (general inflation adjustor is unnecessary and inappropriate because telecommunications is a declining cost industry).

744 AT&T Comments at 53-54; see AT&T Rules Submission, Attachment A at 4-5. Cf. AT&T Comments, App. F at 13-14 (testimony of Christensen) (supports use of either CPI or GNP deflator as adjustment factor to reflect inflation).

745 See Pactel Reply at 6; BellSouth Reply at 2; Bell Atlantic Reply at 5 n.5; SWB Reply at 35-36; NYNEX Reply at 10-11; Ameritech Comments at 22; SNET Comments at 17; United Reply at 7; Centel Reply at 20; USTA Reply at 20; GTOC Comments at 21 (all supporting use of CPI as adjustment factor for inflation). Cf. US West Comments at 37 & n.78 (Commission should consider development of a telecommunications price index, but use of CPI may be reasonable); Rochester Reply at 6 (preferring PPI to CPI, but concluding that the differences between the two indices are not significant).

746 MCI Reply at 8, 25 (supporting use of CPI). Cf. US Sprint Reply at 6 (supporting use of CPI or PPI).

747 SWB Comments at 38-39; NYNEX Comments, App. B at 18 (testimony of Levin); Pactel Reply at 25-26; SNET Comments at 17.

748 USTA Reply at 20; Ameritech Comments at 24; BellSouth Comments at 26; SWB Comments at 38-39.

749 Pactel Reply at 26; Ameritech Comments at 24; Centel Comments at 13; United Comments, App. A at 6.

750 Pactel Reply at 26; Ameritech Comments at 24; BellSouth Comments at 26; SWB Comments at 39; United Comments, App. A at 6.

telecommunications industry input costs.[751]

341. Several CPI proponents emphasize, in particular, that the CPI compares favorably with the BLS's Producer Price Index (PPI) as an index of telecommunications industry inflation. These commenters argue that the PPI is designed primarily as a measure of a firm's cost of purchasing wholesale goods, including raw materials.[752] As a result, they contend, the PPI fails to reflect service industry price changes and changes in costs associated with installation, maintenance, and removal of plant -- all of which are important components of telecommunications input prices.[753] Moreover, a number of commenters argue that the PPI has the added disadvantage of exhibiting short-term volatility, reflective of wide price fluctuations in commodities markets.[754]

342. On the other hand, a few commenters maintain that the PPI, being a measure of producer prices, would be preferable to the economy-wide CPI as an inflation adjustor under price cap regulation.[755] And some parties maintain that either the CPI or the PPI would be acceptable adjustment factors, since the long-term differences between the two indices are not significant.[756]

343. Several parties, led by user groups and states, advocate use of indices that are more narrowly targeted to the telecommunications industry than either the CPI or the PPI.[757] They argue that the CPI, in

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751 E.g., NYNEX Reply at 10-11 (CPI accurately reflects telecommunications input costs); SWB Comments at 39 (actual inflation in the telecommunications industry has closely tracked the CPI).

752 AT&T Comments at 54-55; NYNEX Reply at 10-11; MCI Reply at 28-29; DOJ Reply at 34 & n.56.

753 NYNEX Reply at 10-11; SWB Comments at 40; AT&T Comments at 54; MCI Reply at 28-29; DOJ Reply at 34 n.56.

754 AT&T Comments, App. F at 13-14 (testimony of Christensen); SWB Comments at 39-40; NYNEX Reply at 10-11; DOJ Reply at 34 n.56.

755 Rochester Comments at 16-17; AARP Comments at 4; Illinois Comments at 14-15; West Virginia Comments at 8-9.

756 US Sprint Comments at 41; GSA Comments at 11. Cf. TCA Comments at 10 (undecided as between CPI and PPI); BellSouth Comments at 26 (preferring CPI, but finding PPI acceptable); Rochester Reply at 6 (preferring PPI, but concluding that the differences between it and CPI are not great).

particular, is not an accurate reflection of changes in carrier costs, since it measures economy-wide output prices rather than telecommunications input prices.[758] Moreover, they claim, inflation as measured by the CPI historically has risen at a far greater rate than telecommunications input costs.[759] On the other hand, some commenters preferring use of a broader index warn that an industry-specific inflation adjustor could lead to circularity in price cap adjustments that could diminish cost-cutting incentives.[760]

344. Supporters of an industry-specific inflation index make a number of differing proposals. Several commenters advocate adoption of certain sub-components of PPI reflecting output changes in the most important capital inputs (such as wire, cable, and switching equipment) used by telephone companies, plus a cost component for tracking carrier labor inputs.[761] Other commenters propose that groups such as NARUC and USTA work with state agencies to develop a single national index that reflects both changes in telecommunications input prices and changes in industry productivity.[762] One party argues that the interstate toll component of the

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757 Ad Hoc Reply at 23; id., ETI Report at 27; IBM Reply at 4-5; ACTA Comments at 8-9; Networks Comments at 29 & n.60; NTIA Reply at 13; Michigan PSC Comments at 18; New York DPS Comments at 15; NY EnerTel Comments at 27; DC PSC Reply at 5-6; DC OPC Reply at 5-6; see Ad Hoc Rules Submission at 17-18.

758 E.g., ACTA Comments at 9; NTIA Reply at 13 & n.15; NY EnerTel Comments at 27.

759 E.g., Ad Hoc Reply, ETI Report at 21-27 (alleging that "backcast" analysis demonstrates that carrier rates could have increased more over the past decade under a price cap scheme using a "CPI - 2" adjustment formula, than actually occurred under rate-of-return regulation); TCA Reply at 12-13 (agreeing with ETI Report); DC OPC Reply at 5-8 (use of CPI would lead to rise in cap levels exceeding rise in input costs); Ohio OCC Reply at 8-9 (use of CPI to adjust for inflation would lead to "carrier-friendly discrepancy").

760 E.g., BellSouth Comments at 26.

761 Ad Hoc Comments, ETI Report at 57-63; Ad Hoc Reply, ETI Report at 27. Accord TCA Reply at 12-13; DC PSC Reply at 6.

762 NTIA Comments at 63-64. See also ACTA Comments at 9-10 (advocates NTIA's plan to create a Telecommunications Index).

CPI would be a better inflation adjustment factor than the CPI as a whole.[763] AT&T also mentions the "implicit" gross national product (GNP) deflator as a possible index.[764]

345. Most commenters state that they favor measuring changes to the cost of factors of production on an annual basis.[765] A few parties specify that they would prefer measuring the percentage change in an inflation index over time.[766] One party suggests measuring the percentage change in an inflation index over the most recent six-month period, because use of a recent period is a better predictor of future trends.[767] Two parties state that we should not adopt a procedure that measures inflationary changes by taking the difference between an index at the beginning of a period and its average over the period. These parties argue that such a procedure is overly complicated and would produce inequitable results in periods of high inflation.[768] The GTOCs suggest that the percentage change in the inflation index ought to be based on a forecast of what the change will be.[769]

c. Discussion

346. Before discussing the indices proposed by the commenters, we believe it is important to clarify and refine what economic changes we seek to capture in the index we will select. While our Notice sought to identify an index that captured changes in the purchasing power of money, i.e., a

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763 DC OPC Reply at 6.

764 AT&T Comments, App. F at 13-14 (testimony of Christensen). See also Florida PSC Comments at 9 (notes that either the CPI or GNP deflator reflects changes to the economy as a whole).

765 AT&T Comments at 54-56, App. F at 2-3 (testimony of Christensen); Bell Atlantic Comments, Attachment I at 4-5; US West Comments at 27; USTA Reply, Attachment A at 5; NYNEX Comments at 31; SWB Comments at 3; SNET Comments at 16; US Sprint Comments at 36-37; GSA Comments at 11-12; West Virginia Comments at 8; see Bell Atlantic Rules Submission, Attachment A at 8.

766 Pactel Comments at 5 & n.3; BellSouth Comments at 32-33.

767 Centel Comments at 13.

768 BellSouth Comments at 32-33; Rochester Comments at 16-17.

769 GTOC Comments at 21; see GTOC Rules Submission, App. A at 9.

general index of inflation, its purpose in identifying such an index was to capture inflationary changes that the carriers themselves face. Thus, the index we seek to adopt should capture changes in the purchasing power of money as a measure of the cost of factors of production. By selecting an index that will most closely mirror the inflationary pressures faced by carriers, our price cap formula will produce a result more equitable to both the carriers and ratepayers. As we evaluate the indices proposed by the parties, we will examine which index best reveals changes in the purchasing power of money as a measure of the cost of factors of production.

347. Our review of the indices proposed by the commenters reveals that the proposed measures contain weaknesses that may produce anamolous results if employed as a measure of changes to a carrier's cost of purchasing factors of production. The CPI, PPI, some subset of either the CPI or PPI, or the "implicit" GNP deflator, each fails in some way to capture the costs faced by carriers in the provision of service. We are therefore proposing the use of an index not named by the commenters, but which we believe will provide the best available measure of inflationary changes faced by dominant carriers -- the GNP price index (GNP-PI), also known as the "fixed-weight GNP deflator." We will first describe the GNP-PI, and then discuss the differences between our proposed index and the various indices favored by the commenters.

348. The GNP-PI is one of a series of GNP-based price indices published by the U.S. Department of Commerce.[770] The GNP-PI utilizes an historical base period (currently 1982), and summarizes price changes in all sectors of the economy, not just in consumer goods. The GNP-PI estimates are available approximately the third week after the end of each quarter, based on actual data from the first two months of the previous quarter plus estimates of the final month. The original GNP-PI estimate is revised in the second month after the close of the quarter, and again 75 days after the close of the quarter, once all the actual data from the quarter have been received. We propose to use the 75-day estimate of the GNP-PI as the adjustment factor for measuring changes in the carriers' purchasing power of money, unless an annual revision to the GNP-PI is available.[771]

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770 The index we refer to is published as the first index in a group of indexes entitled the "Fixed-Weighted Price Indexes for Gross National Product, 1982 Weights." See Bureau of Economic Analysis, U.S. Dept. of Commerce, Surv. of Current Bus., Vol. 67 No. 12 (Dec. 1987) at 11 and Table 7.1 and Economic Report of the President (1988) at 254 and Table B-4.

771 While later revisions are made to the GNP-PI, historical experience suggests that the revisions are sufficiently insubstantial to enable us to employ the 75-day figure as a final measure.

349. We believe the GNP-PI is a better index for measuring changes in the carriers' costs than the CPI.[772] The CPI measures prices that consumers pay for goods and services in proportion to their prominence in a survey of consumers' budgets. The expenditure categories contained in the CPI, such as housing, transportation, and food and beverages, do not have much relevance to dominant carriers' costs. In contrast, most of the purchases made by carriers are of "intermediate" or capital goods. The GNP-PI captures changes to the prices of these investment goods, as well as consumer goods. Although the GNP-PI does not precisely reflect the costs carriers face in procuring goods and services, it is a broad-based index that reflects price experience in numerous relevant markets, as compared to the narrower CPI.

350. Furthermore, our review of the differences in the GNP-PI and the CPI since 1959 reveals that the CPI is more affected by price increases in certain specific sectors of the economy, such as energy and medical care, than is the GNP-PI, and has therefore both grown faster and experienced more volatility than the GNP-PI.[773] These characteristics demonstrate that the CPI is more likely to be influenced by possibly atypical price experience in a limited number of markets. Given that adjustments to price caps are intended to reflect changes in overall costs, we believe that the inflation index we select should avoid, to the greatest degree possible, any risk that it will diverge substantially from the carriers' own cost experience. A broad-based index, such as GNP-PI, better captures that experience.

351. We also tentatively conclude that the GNP-PI is a better measure of the carriers' factor cost experience than is the PPI, or any subindex thereof. The PPI is published by the BLS and measures prices charged by manufacturers for the first commercial transaction of an item.

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772 As used in this Further Notice, the CPI means the CPI for urban consumers.

773 From 1959 through 1986, the GNP-PI experienced a growth of 307 percent, compared to the CPI's 376 percent growth. The CPI is also more volatile, with annual changes exhibiting a standard deviation of 3.49 compared to 2.62 for the GNP-PI, and a larger coefficient of variation of .69, compared to .61 for the GNP-PI. There are three primary reasons for the difference in growth rate and volatility: (1) the CPI's historical bias toward new housing expense, corrected in 1983; (2) increases in the cost of energy and medical care, which are more significant in consumers' budgets than in the economy as a whole; and (3) the relative magnitude of price increases for personal consumption expenditures as compared to the other components of the GNP.

Thus, it represents the price received by the manufacturer, not generally the price paid by those consuming the product, in producing a consumer good or service. The program collects data from all manufacturing and mining industries, but these collectively account for less than 25 percent of U.S. employment. No price data are collected from government, construction, retail trade, or most service sectors of the economy. Thus, the PPI is a much narrower index than the GNP-PI, subject to the same types of volatility and growth pressures as is the CPI.

352. Moreover, the PPI indices would not capture the change in a carrier's costs as adequately as the GNP-PI. The "finished goods" PPI, for example, represents costs of commodities that are ultimately sold to consumers; capital equipment represents only about 7 percent of the weight of this index. The "all commodities" PPI tracks raw materials, intermediate goods, and finished goods, but telephone carriers consume few raw materials. In addition, because telephone companies typically purchase goods from suppliers, the price received by the manufacturer would not be a good measure of carriers' costs.

353. The use of PPI subindices as a measure of carrier cost inflation would present similar problems, as well as introduce additional complications. The PPI subindices do not correlate with the carriers' prescribed accounts and would require detailed and complex adjustments before the subindices could be used as a surrogate for the carriers' purchasing power of money. For example, PPI subindices may include equipment that is not used by carriers in the provision of service, while carriers' prescribed accounts may include equipment that is not contained in a PPI code. We estimate that up to 100,000 types of carrier plant potentially could have to be compared to approximately 8,000 PPI codes in order to develop an adequate measure of the inflationary pressures faced by carriers.

354. We also tentatively reject suggestions that groups within the telecommunications industry develop a new index that reflects both price changes and industry productivity. Furthermore, development of a new index would be a difficult, and no doubt a heavily contested, process. We see no need to resort to such measures when an acceptable index -- the GNP-PI -- already exists.[774]

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774 We also reject the "implicit" GNP deflator as a measure of the carriers' factor cost inflation. The Commerce Department has cautioned against use of the implicit GNP deflator as a price index because it is a "Paasche" (current year weight) index that will fluctuate according to changes in the relative composition of the GNP, as well as to changes in prices.

355. Having selected the GNP-PI as the best measure of the inflationary pressures faced by carriers, we also propose a specific methodology for measuring changes to it. We propose that changes to the GNP-PI should be the difference between the GNP-PI for the quarter ending six months prior to the effective date of the tariff and the GNP-PI for the corresponding quarter of the preceding year. The use of an annual GNP-PI will provide relatively recent information on the cost of factors of production, while avoiding the greater volatility that might result from use of a six-month average. As we have discussed, we propose to use the 75-day estimates of the GNP-PI. We also believe that an annual GNP-PI will provide the best predictor of future changes in the cost of factors of production. We therefore reject suggestions to employ a forecast GNP-PI in favor of use of historical data. Use of historical data will impart greater certainty than a forecast figure.[775]

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775 Indeed, historical data are implicitly being used precisely in order to forecast. In this connection, the relevant question is what constitutes the best predictor of next year's GNP-PI. Over the same interval of data previously described, the best predictor of next year's GNP-PI is this year's GNP-PI. Those two series of data exhibit a simple correlation of .85, indicating very close similarity. This correlation would be reduced if we relied on a lagged GNP-PI or a two- or three-year moving average of GNP-PI.

3. Measurement of Changes in Productivity

356. The original Notice proposed inclusion of some measure of productivity increase in the exchange, interexchange, or entire telecommunications industry or within some comparable industry.[776] The purpose of such an adjustment was to ensure that reasonably anticipated increases in carrier productivity result in lower prices for telecommunications services. A productivity adjustment also assures that ratepayers receive short-term, as well as long-term, benefits from price cap-induced efficiencies. The Notice requested comment on the choice of a productivity measure and the need for different measures for AT&T and the LECs.[777]

a. Measuring Productivity

i. Pleadings

357. Commenting parties propose a variety of productivity adjustment options, including formulas that contain no separate adjustments for productivity, those with fixed annual productivity offsets, and those with variable adjustment mechanisms. AT&T and those OCCs commenting on the issue propose an annual inflation adjustment to AT&T's price caps based upon movement in the CPI, but they oppose subtracting a separate productivity adjustment factor from the annual CPI adjustment.[778] These carriers contend that since the CPI already reflects economy-wide productivity changes, a separate adjustment for productivity is unnecessary.[779] The OCCs assert

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776 Notice, 2 FCC Rcd at 5218-19 (para. 62).

777 Id.

778 AT&T Comments at 55; AT&T Reply at 28 n.**; MCI Comments at 32-36; US Sprint Reply at 6. AT&T consultants Christensen, Baumol, and Willig, while preferring a general inflation index to reflect AT&T's productivity changes, propose as an alternative mechanism the imposition of an additional productivity offset based upon total factor productivity (TFP) measurements. See AT&T Comments, App. F at 2-3, 11-13 (testimony of Christensen) (proposes that the general inflation index, such as CPI or GNP deflator, be offset by the difference between economy-wide TFP changes and the estimated AT&T TFP changes that would have occurred if rate-of-return regulation had continued); AT&T Comments, App. C at 23-28 (testimony of Baumol and Willig) (proposes that the "CPI - X" formula, in which X is a productivity offset, corresponds to the difference between a telecommunications input price index and a telecommunications TFP index).

779 AT&T Reply at 28 n.**; MCI Reply at 25; US Sprint Reply at 6.

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or imply that most currently available productivity improvements are already reflected in interexchange service prices, and that any attempt to impose an additional productivity offset on AT&T could impair competition and distort the efficiency incentives that price caps are intended to create.[780] AT&T adds that existing and future competition in the interexchange market will ensure that consumers receive the benefits of any incremental productivity gains not reflected in the general inflation index.[781]

358. Commenting local exchange carriers generally oppose total reliance upon an inflation adjustment to reflect productivity changes under price cap regulation.[782] Instead, most LECs propose adoption of a fixed annual productivity adjustment of approximately 2 percent (e.g., a formula of "CPI - 2") during an initial three-to-five year price cap period.[783] A few LECs propose immediate adoption of a variable productivity factor that fluctuates annually based upon changes in the rolling averages of pertinent

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780 See US Sprint Reply at 6 (a productivity adjustment would interfere with the efficiency incentive provided by price caps, since AT&T's productivity changes cannot be accurately measured); MCI Comments at 32-36 (interexchange productivity gains are now declining as currently available technological innovations have already been implemented, and imposing indirect profit regulation through productivity adjustments will impair efficiency incentives).

781 AT&T Reply at 28 n.**. Cf. AT&T Comments, App. F at 8 (testimony of Christensen) (suggests that this Commission adjust caps to reflect only changes in purchasing power of money -- e.g., CPI -- but that we monitor AT&T's actual prices and earnings to ensure that competition is a factor in driving productivity gains through to consumers).

782 But see Ameritech Comments at 26; Rochester Comments at 17 (both asserting that since CPI or PPI already reflect productivity changes no additional adjustment factor is necessary).

783 See, e.g., BellSouth Comments at 30-32 (annual 2 percent offset during initial 3 1/2 year period); Pactel Comments at 5-6 (annual 2 percent offset during initial 3-to-5 year period); SWB Comments at 42-43 (annual 2 percent offset during initial period of at least 3 years); Bell Atlantic Comments, Attachment I at 5 n.7 (annual 2.2 percent offset); NYNEX Reply at 13 (fixed annual productivity offset during initial 3-year period); GTOC Comments at 22 (fixed annual offset during initial 3-year period); SNET Comments at 18-19 (fixed negotiated annual offset during initial 3-year period). See also GTOC Rules Submission, App. A at 9-10 (productivity factor would be adjusted by "carrier productivity weighting factor").

productivity indices.[784] Although not their first choices, two carriers assert that a productivity offset calculated as a fixed percentage of the annual change in the CPI would be a practical mechanism that could ensure a real decline in rates while tempering the CPI's volatility.[785]

359. Whether expressed as an offset that is fixed for some finite period, or as a factor that fluctuates from year to year, the productivity adjustment mechanisms contained in most LEC plans use total factor productivity (TFP)[786] indices, at least as guideposts. A number of carriers advocate use of the American Productivity Center's (APC) Multifactor Productivity Measure for the Communications Industry as a benchmark.[787] One LEC proposes that after the expiration of the initial price cap review period, this Commission should require that productivity adjustments be based upon a rolling average of the BLS TFP index for the telecommunications industry, which it states is scheduled to be released annually beginning in 1988.[788] Several LECs contend that the productivity

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784 See Centel Reply at 21-22 (productivity offset based upon the 10-year rolling average of the American Productivity Center's TFP index for the telecommunications industry); US West Reply at 35-37 (productivity offset equal to 2 times the 10-year rolling average of the BLS Total Factor Productivity Index for the United States for Tier 1 carriers). See also US West Rules Submission, Attachment A at 14-15. Compare NYNEX Comments at 33 (4-year rolling average of BLS Multifactor Productivity Measure for Private Business (MPMPB)) with NYNEX Reply at 13 (abandons proposal for variable productivity factor during the initial price cap period in favor of a fixed offset based upon the 1984-1987 average of the BLS MPMPB).

785 See Ameritech Comments at 26; US West Comments at 37-39. But see Pactel Reply at 29 (opposes use of a percentage decrease in the inflation index as a productivity adjustment, because there is no evidence that productivity varies directly with inflation).

786 TFP indices measure the effect on output of all inputs -- e.g., labor, capital, and materials -- employed in producing the output. For example, if a producer experiences a 4 percent increase in output, but increases inputs by only 2 percent, then the TFP growth would be 2 percent.

787 USTA Reply at 20-21 (bases productivity offset on the APC's most recent 10-year average); SWB Comments at 42-43 (bases initial period offset on the most recent 8-year average of the APC index, and proposing future variable adjustment based upon an 8-year rolling average); Centel Reply at 21-22 (bases variable offset on 10-year rolling average of APC index). See USTA Rules Submission, Attachment A at 9-10.

788 GTOC Comments, App. C at 1-4. See also Pactel Reply at 28 n.51

offset should be based upon or correlate with the BLS Multifactor Productivity Measure for Private Business.[789]

360. The LECs generally contend that a TFP index is preferable to narrower productivity measurements (such as a labor index) because it reflects the relationship between all input costs and productive output.[790] Those LECs supporting telecommunications industry TFP indices, such as the APC index or the nascent BLS telecommunications index, argue that by excluding data from other industries such measurements most accurately reflect actual productivity changes experienced by the carriers.[791] Some carriers caution, however, that use of an index, such as APC's, that is not developed by a governmental agency may undermine public confidence in the adjustment mechanism.[792] Moreover, they note, even the APC index includes measurement of industry participants, such as ICs and broadcasters, that have different technological characteristics from LECs.[793] Thus, these carriers assert that, on balance, broad government-sponsored TFP indices like the BLS Multifactor Productivity Measure for Private Business are best.[794]

361. Most other parties addressing the issue, particularly consumer and user groups, criticize the productivity adjustment mechanisms advocated by both the ICs and the LECs. Several argue that AT&T's proposal

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(proposes that this Commission consider using the BLS telecommunications index after the initial review period if the new index appears to be reliable).

789 E.g., NYNEX Comments at 32-33; NYNEX Reply at 13; Pactel Reply at 28-29.

790 E.g., GTOC Comments at 21-22; SWB Comments at 41-42; NYNEX Comments at 32-33.

791 E.g., USTA Reply at 20-21; GTOC Comments, App. C at 3-4. Cf. NTIA Comments, Regulatory Alternatives Report at 63-64 (proposes that NARUC and USTA work with state agencies to develop a single national telecommunications industry TFP index).

792 E.g., Pactel Reply at 29.

793 E.g., US West Reply at 36 & n.89.

794 See generally GTOC Comments at App. C.

to rely upon the CPI alone to reflect productivity gains is inadequate.[795] They maintain that the CPI fails to track national productivity trends,[796] much less the above average productivity performance experienced by the telecommunications industry over the last four decades.[797]

362. Several commenters also oppose use of a telecommunications industry TFP index as the basis for adjusting price caps to reflect productivity changes.[798] Instead, these parties propose use of an index reflecting output per hour of labor in the telecommunications industry, which allegedly would share with consumers the efficiency gains attributable to past investment, and would encourage carriers to invest prudently in the future.[799] However, LECs and ICs uniformly oppose use of a labor index to reflect carrier productivity changes, arguing that such an index would significantly overstate carrier performance by discounting the capital costs associated with improved labor output.[800]

ii. Discussion

363. Productivity advances in a firm or industry are manifested in increased output from the same amount of factors of production, or equivalently, the same amount of output from decreased levels of factor utilization. In either case, the dollar cost of a unit of output declines

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795 Ad Hoc Reply, ETI Report at 20-25; NASUCA Reply at 24; CFA Reply at 3-4.

796 NASUCA Reply at 24-25 (asserting, among other things, that the CPI reflects national productivity changes only to the extent that such changes are directly translated into price adjustments, which is not the case in markets that are not highly competitive).

797 Id. at 25-26; Ad Hoc Reply, ETI Report at 20-25; CFA Reply at 3-4.

798 Ad Hoc Reply, ETI Report at 31.

799 Id.; see Ad Hoc Rules Submission at 17-18. Accord TCA Reply at 13; DC PSC Reply at 8.

800 Pactel Reply at 29; NYNEX Reply at 12; SWB Comments at 41-42; GTOC Reply, Attachment B at 3; MCI Reply at 30 n.21.

due to the diminished factor requirement per unit of output. Of course, if some or all factor prices are rising at the same time, those price rises will at least partially offset the reductions that would flow from improved productivity by itself. Nonetheless, the net price effect of productivity and any such factor price increases would continue to be less than the factor cost changes in isolation. For this reason, any form of regulation that is based on the costs of production must take productivity gains into account.

364. While we agree with some of the commenters that the use of a price index, such as the GNP-PI, automatically reflects certain productivity gains in the economy, we believe that the GNP-PI does not reflect the entirety of productivity gains experienced by carriers. The GNP-PI measures changes in the level of actual market prices, which nets out any productivity gains from price increases that would otherwise occur. For example, if the cost of factors required to produce a unit of output rises by 5 percent, but productivity increases by 2 percent, then actual market prices need increase by only 3 percent to maintain the same level of producer profit. It is this latter figure -- the change in actual prices, net of any productivity gains -- that the GNP-PI and other price indices capture. Therefore, it can be said that price indices already embody the average, economy-wide productivity increase.[801]

365. As a result, any industry whose productivity increase matches that of the economy as a whole will have its productivity gain accounted for in any broad-based price index. But it is equally true that any industry whose productivity experience differs from that norm will not be accurately represented in such a price index. Therefore, it is important to establish whether the telecommunications industry has experienced productivity increases over relevant periods of time that equal, fall short of, or exceed the economy-wide average productivity gains. Our examination of the available evidence reveals that the telecommunications industry has experienced productivity gains in excess of those experienced by the economy as a whole.

366. As noted above, productivity can be thought of as simply output per unit of input. For an industry like telecommunications that produces multiple outputs and employs multiple inputs, some device must be employed to summarize these diverse and incommensurate factors. The commonly accepted mechanism for doing so is "total factor productivity."

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801 See J. Kendrick, Understanding Productivity 76-77 (1977); E. F. Sudit, Automatic Rate Adjustments Based on Total Factor Productivity Performance in Public Utility Regulation, in Problems in Public Utility Economics and Regulation (M. Crew ed. 1979).

Total factor productivity aggregates all inputs in accordance with their importance in the firm's overall costs, and aggregates all outputs in accordance with their importance in the firm's revenues. Focus on any single input (such as employee hours of labor) will give a misleading impression of the firm's true productivity since any gains in output per employee hour may result merely from costly additions of capital inputs, and not from any overall efficiencies.

367. Total factor productivity typically encompasses use of labor, capital, and raw materials as the relevant factors, and considers as many distinct outputs as necessary to portray the firm accurately. On occasion, so-called total factor productivity studies limit their attention to just two factors, such as labor and capital. This is ordinarily too narrow a definition for a single company or industry, since productivity thus measured may be increased by use of excessive raw materials. But for studies of the productivity of an entire economy, two-factor studies may be more reliable for the simple reason that raw material use in the economy as a whole largely cancels out among different industries.[802]

368. One of the more detailed studies was performed for AT&T by an outside consultant and filed in United States v. AT&T.[803] This study measured total factor productivity for the Bell System as a whole for the years 1947-78. The author defined five output measures, namely, local service, interstate toll, intrastate toll, directory advertising, and miscellaneous services. His factors of production consisted of measurements of labor services, capital services, and raw materials, each of which was comprised of several types of such inputs. The study concluded that Bell System productivity grew at an annual rate of 3.2 percent during those years, compared to an economy-wide productivity increase averaging 1.1 percent. The Bell System's productivity advantage was therefore 2.1 percentage points over the rest of the U.S. economy. This differential rose during the interval studied, reaching 3.0 percent in the period 1966-78.

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802 See generally J. Kendrick & E. Grossman, Productivity in the United States 12-14 (1980); S. Fabricant, Problems of Productivity Measurement, in Measuring Productivity 32-33 (1984) AT&T, Bell System Productivity Study 1947-78 5-6 (Nov. 1979).

803 Testimony of L. Christensen filed in United States v. AT&T, Civ. Action No. 74-1698 (D.D.C. filed Nov. 20, 1974). The trial in that case terminated in the consent decree divesting the Bell Operating Companies from AT&T. See United States v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

369. AT&T also has conducted its own study of Bell System total factor productivity. During the period 1948-78, the Bell System reported productivity gains of 3.2 percent calculated for three factors (labor, capital, and raw materials) or 3.7 percent for two factors (labor and capital only) during the period 1948-78.[804] Relative to the latter figure, the economy-wide two-factor productivity number was calculated to be 1.9 percent, resulting in an advantage for the Bell System of 1.8 percent. The average differential masks a rising trend. From 1948-65, the differential favoring the Bell System was 1.1 percent; from 1965-72, it was 2.1 percent; and from 1972-78, it was 3.9 percent.

370. These studies demonstrate that Bell System productivity has been large and that it grew throughout most of post-World War II period. Relative to the entire economy, firm productivity was 1.8 to 2.1 percent greater, and appears to have been higher during the later period than the earlier period.

371. There are other published studies of some relevance. One has examined four-factor productivity within the Bell System,[805] including research expenditures in addition to labor, capital, and raw material inputs. The study found an average annual increase in productivity of 4.09 percent for the period 1947-76. This increased from 3.50 percent in 1947-57, and 3.65 percent in 1958-67, to 4.96 percent in 1968-76. Another study has measured total factor productivity of Bell of Canada.[806] Despite differences in the economic, technological, and regulatory environments affecting the companies, it found productivity increases of similar magnitudes to those reported for the United States. In particular, this study reported an average annual increase of 3.35 percent over the period 1952-76, rising from 1.3 percent in the first five years to 4.5 percent in the last five. Although neither of these studies produced comparative data on the economy as a whole, both show levels and trends of Bell System productivity entirely consistent with the other studies cited.

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804 AT&T, Bell System Productivity Study 1947-78 (Nov. 1979).

805 M.I. Nadiri & M. Schankerman, The Structure of Production, Technological Change, and the Rate of Growth of Total Factor Productivity in the U.S. Bell System, in Productivity Measurement in Regulated Industries (T. Cowing & R. Stevenson eds. 1981).

806 M. Denny, M. Fuss & L. Waverman, The Measurement and Interpretation of Total Factor Productivity in Regulated Industries, with an Application to Canadian Telecommunications, in Productivity Measurement in Regulated Industries (T. Cowing & R. Stevenson eds. 1981).

372. A somewhat different approach is embodied in the productivity estimates generated by the American Productivity Center (APC).[807] The APC calculates two-factor productivity for the economy as a whole and for various manufacturing and service sectors, including communications. As noted above, the two-factor approach may not be best for individual firms or industries. Moreover, the "communications" data series that is employed by APC is defined by the Commerce Department to include some non-telecommunications activities such as broadcasting. Notwithstanding these limitations, it is useful to note that over the entire 1948-85 period, the APC measure of communications productivity rose at an annual rate of 3.9 percent. Overall, economy-wide two-factor productivity rose 1.7 percent, so that the communications productivity advantage was 2.2 percent, almost exactly that of other studies. In contrast to all other studies, however, this APC series shows a decline in productivity gains over time, falling from 5.6 percent per year in 1948-63 to merely 1.3 percent in 1979-85. Indeed, since 1983 the APC index for communications has been in actual decline, although the reasons are in some dispute.[808]

373. These various productivity studies measure the increase in output per unit of input in telecommunications. In other words, these studies measure the decrease in the real dollar cost of a unit of output, since each unit of input produces more output. As a result, productivity increases should be reflected in inflation-adjusted prices of the output. In the present case, this implies expected reductions in the price of telecommunications services relative to all prices of about 2 to 3 percent.

374. There is important corroboration of this fact from various price series compiled by the Bureau of Labor Statistics.[809] Between 1935 and 1985, overall CPI rose by an annual average of 4.20 percent, whereas

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807 American Productivity Center, Multiple Input Productivity Indices.

808 APC attributes this to the break-up of AT&T, citing possible customer confusion as leading to slow demand and output growth since 1983. Communications Industry Productivity Dropping, Communications Daily, Nov. 10, 1987, at 1 (citing an APC vice president). Yet others have rightly noted that post-divestiture demand has been growing more rapidly than before, creating some doubt as to the reliability of APC's measure. See Ad Hoc Reply, ETI Report at 28.

809 See J. Lande & P. Wynns, Primer and Sourcebook on Telephone Price Indexes and Rate Levels (unpub. Apr. 1987)(on file with Industry Analysis Division, Common Carrier Bureau, FCC).

the CPI subindex for telephone services (local and long distance) rose by an average of 2.25 percent. This differential of 1.95 percent is close to the Bell System productivity advantage of about 2 percent previously noted. Moreover, much like those productivity advantages, the price data also show an increasing differential in more recent periods. For example, the overall CPI from 1955 to 1985 was 4.74 percent per annum, compared to CPI-Telephone of 2.53 percent; for 1975 to 1985, overall CPI rose 7.17 percent per year, relative to 4.53 percent for telephone prices. Thus, the differential for the past 30 years has been 2.21 percent, and for the past 10 years, 2.64 percent.

375. None of these productivity studies distinguishes long distance from local telecommunications services. Indeed, for most of the historical period investigated by these studies, such a distinction cannot be drawn from existing data because of the growing role of separations requirements in the economics of long distance vs. local service. Starting in 1943, a certain percentage of the costs associated with the local loop was assigned to interstate MTS. By the early 1980s this percentage grew to about 33 percent, and these costs comprised nearly one-half of the per minute charges for MTS. One consequence of this is that all existing indices of interstate or intrastate rates have embedded within them this essentially arbitrary allocation of very large system costs. Thus, the indices are not reliable guides to any meaningful notion of the productivity for the interstate vs. intrastate services during this interval. Moreover, any efforts to disentangle the effects of separations changes must be viewed with some skepticism. For this reason, for most of this period, the most meaningful price data are those for all telephone services.

376. In the post-divestiture period, a more accurate accounting of separations and hence of the separate local and long distance prices may be possible. Bell Communications Research, Inc. (Bellcore), for example, has conducted a study of changes in the price of interstate access between May 1984 and December 1986, and concluded that relative to CPI, those prices fell at an annual rate of 1.54 percent.[810] This is taken to reflect the annual productivity increment applicable to those services. Although we do not endorse this study in all respects, its conclusions are not fundamentally dissimilar from those found in other research.

377. We have also reviewed AT&T's price changes in the post-divestiture period and computed the productivity number that is implied by the past four years of price experience. Although AT&T's MTS usage rates

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810 Bellcore, The Impact of Federal Price Cap Regulation on Interstate Toll Customers at 16 (Mar. 17, 1988)(Bellcore Study).

have declined by 34 percent since divestiture, most of that decline has been a result of the implementation of our access charge program.[811] Under our proposed price cap plan, reductions in access charges will continue to produce direct reductions in AT&T's price caps. After adjusting for changes in access charges, and other exogenous changes in accordance with our proposed plan, we estimate that AT&T's prices net of access charges have risen by 0.90 percent per year between the first post-divestiture tariff (May 1984) and the present.[812] Our proposed price index, the GNP-PI, rose at a compounded annual rate of 3.38 percent between the second quarter of 1983 and the second quarter of 1987, the relevant time period for measuring price levels if price cap adjustments had been computed for January 1 of the years 1985, 1986, 1987, and 1988. Consequently, AT&T's implied productivity factor over the past four years is 2.48 percent per year better than the GNP-PI, a result similar to that of the long-term studies of the entire Bell System.

378. Based on all this evidence, we conclude that the telecommunications industry, and the Bell System in particular, have been a distinctly productive sector of the U.S. economy. Relative to overall productivity and prices, they have shown a long-term differential of about 2 percentage points per annum since the 1930s, with a somewhat larger differential of about 2.5 percentage points per annum in more recent years. As a result, we reject the suggestion that the likely future productivity improvements of AT&T and the LECs are adequately represented in the economy-wide productivity averages implicit in the price index.

379. We disagree with those commenters who argue that there should be no productivity adjustment for AT&T on the basis that its rates already reflect productivity gains because AT&T is subject to competition. If competition were strong for all of AT&T's services, its rates would decline in accordance with the productivity factor we have proposed. In that case, this factor would be redundant. But to the extent that AT&T enjoys residual market power over any services, competition cannot be relied upon to ensure rate decreases corresponding to expected productivity gains.

380. Given our tentative decision to incorporate a separate productivity adjustment into the price cap formula, our next task is to propose the best method of incorporating reasonable anticipations of the

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811 The decline is calculated based on AT&T usage and non-usage rates in effect January 1, 1988, compared to those rates in effect prior to May 25, 1984.

812 The basis for this estimate is presented in Appendix C.

productivity increases of AT&T and the LECs. This could be done in either of two ways. The first would be to devise a method to measure productivity gains each year, and then adjust the price cap by some amount reflecting the differential between the calculated productivity and overall productivity. Alternatively, a specific number designed to estimate the future productivity differential could be selected and employed for some interval of time. Each of these alternatives has advantages and disadvantages.

381. Direct measurement of productivity has the apparent advantage of capturing the exact factor sought, namely, the productivity achieved by AT&T and the LECs. Yet the task of measurement is fraught with conceptual and practical difficulties, with the almost inevitable result that it would become the center of debate and controversy. Moreover, much of the necessary data are not publicly available, raising questions about the ability of outside parties to review the calculations. For these reasons, we tentatively conclude that this Commission should not undertake our own measurements of AT&T or LEC productivity as part of the price cap formula.

382. Selection of an estimated productivity number is the remaining alternative. We tentatively conclude that this method is simpler to employ, and more readily understood than direct measurement. Moreover, use of an unchanging, exogenous benchmark may provide the strongest incentives at the margin for cost savings by the dominant carriers, since outperformance of a fixed productivity measure will not lead to immediate or complete recapture of cost savings. Rather, the constant benchmark ensures the carriers of their ability to retain some savings in the event they outperform the productivity measure, at least until the next performance review of price caps generally.

383. The commenters have suggested three possible measures, each of which we believe is flawed. We have previously discussed the problems with the APC index,[813] and we tentatively reject the use of that index as a measure of productivity changes for dominant carriers. We also tentatively reject the use of the BLS's TFP for the telecommunications industry and the BLS's Multifactor Productivity Measure for Private Business. The TFP for the telecommunications industry does not currently exist, and may not until sometime in 1989. Moreover, caution suggests that we might not wish to rely exclusively on a new index until at least some experience is developed that

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813 The APC index's flaws are: (1) its inherent limitations because it relies on two-factor productivity; and (2) the inclusion of economic activity extraneous to dominant carriers.

satisfies concerns about its reliability. With respect to the BLS Multifactor Productivity Index for Private Business, this is merely an average for the private nonfarm sector, an overly-broad aggregation whose productivity experience has been considerably inferior to that of the Bell System, as previously described.

384. We tentatively find that, since none of the productivity measures proposed by the commenters adequately captures productivity changes we believe are experienced by dominant carriers, we should select our own productivity measure from the evidence before us. In making this determination, a balance must be struck between the objective of strengthening cost-cutting incentives and the commitment that consumers be better off under the price cap formula. Overlapping with these criteria are the concerns that rates be neither so high as to be unreasonable and harmful to consumers, nor so low as to unreasonably impair the carriers' ability to attract sufficient capital to conduct their operations. In particular, while a large productivity number may provide consumers with greater apparent benefits, an overestimate of the realizable productivity gains may jeopardize carriers' ability to offer services. Similarly, selection of a low number may run risks of yielding unreasonable returns to the carriers and failing to generate net benefits to consumers.

385. The evidence previously reviewed demonstrates that since the 1930s, telephone industry productivity has averaged a 2 percent greater gain per year than the overall economy, with larger increases in the later years than the earlier years. This evidence, together with our own analysis of AT&T's post-divestiture rates showing a productivity differential of 2.48 percent, suggests than 2.5 percent per year is a reasonable estimate of potential future productivity gains if existing regulatory methods remain in place. None of the available studies or other evidence provides any basis for assigning a different productivity adjustment for the LECs relative to AT&T. Since we intend initially to hold the Carrier Common Line Charge (CCLC) outside of price caps, we seek comment on whether the exclusion of CCLC constitutes a basis for the assignment of a different initial productivity adjustment to the LECs, or alternatively whether it constitutes a basis for the assignment of a different productivity adjustment to the LECs upon inclusion of the CCLC in price caps in 1990.

386. We do not believe, however, that adopting an annual productivity adjustment to price caps equal to this historical trend is sufficient to achieve our goals in this proceeding. As we have previously stated, ratepayers should benefit from the adoption of price caps and should share in the efficiency gains produced by carriers. Accordingly, we tentatively find that the productivity adjustment should exceed the industry's demonstrated, historical ability to achieve productivity gains. We propose that the productivity factor be established at 3 percent (2.5 percent for estimated productivity under rate-of-return regulation plus an additional adjustment of 0.5 percent). We refer to the differential between

historical productivity and the productivity factor we propose as the "Consumer Productivity Dividend." Establishing a productivity factor at this level will stimulate carriers to generate productivity gains in excess of historical experience and will subject the price cap index to significant downward pressure each year.[814]

387. We tentatively find that establishing the productivity factor at 3 percent represents the best balancing of ratepayer and carrier interests under a price cap system. We tentatively conclude that carriers will be able to generate productivity gains of 3 percent per year under price cap regulation. Furthermore, the half a percentage point premium that we are placing on the productivity factor ensures that, on an ongoing basis, ratepayers will be better off under price caps than they would have been under rate-of-return regulation.

388. We request comment on our selection of the 3 percent productivity adjustment factor, and on the data we have examined in reaching our conclusion that the more recent historical productivity increase for the telecommunications industry has been approximately 2.5 percent over and above the economy as a whole. We also request commenters to submit other data that we have not considered herein that indicate productivity trends the same as, or different from, those we have identified.

389. We also seek comment on our tentative conclusion that historical productivity should be increased by 0.5 percent per year in order to share the expected productivity improvements due to price caps between consumers and carriers. We seek comment on whether the differing degrees of competition between AT&T and the LECs should affect the determination of the price cap Consumer Productivity Dividend (CPD). As an alternative to our proposal that the CPD be set at 0.5 percent for all carriers, we seek comment on whether it should be set at 0.5 percent for the LECs and zero for AT&T. Under this alternative proposal, we would guarantee by regulation that AT&T's prices would drop at least as much under price caps as under rate-of-return regulation, but we would rely on competition rather than regulation to produce the additional consumer gain expected from price caps. We seek comment on the alternative proposal generally, and seek specific comment on the likelihood that AT&T would set its prices below its caps if we should adopt the alternative proposal.

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814 Although the actual price cap level will depend upon other adjustment factors, both the inflationary changes and the other exogenous changes reflected in the formula are types of costs that are routinely passed through to ratepayers under rate-of-return regulation.

b. Application of Productivity Factor to All Dominant Carriers

i. Pleadings

390. The parties express a variety of views regarding the propriety of adopting a single price cap adjustment factor, in addition to an inflation index, to reflect changes in productivity for all carriers. Most large independent LECs, while agreeing that a productivity adjustment may be appropriate,[815] express concern regarding LEC diversity and the need to develop a mechanism that reflects the different efficiency enhancing opportunities facing different carriers, depending upon such factors as firm or study area size,[816] past investment in new technology,[817] or rates relative to those of other carriers.[818] Some LECs oppose the application of

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815 But see Rochester Comments at 17; Rochester Reply at 7 (opposes use of a separate productivity adjustment beyond the PPI or CPI, since those indices automatically reflect broad based productivity increases and any effort to gauge additional productivity changes among widely divergent firms would be difficult and controversial).

816 E.g., USTA Reply, Attachment A at 6-7 (multiplying fixed productivity offset by 1.1 for study areas with over 200,000 access lines, by .5 for study areas with from 50,000 to 200,000 access lines, by 0 for study areas with less than 50,000 access lines); GTOC Comments at 23-24 (multiplying fixed productivity offset by weighting factors that vary by size of study area); United Comments, Appendix A at 9; Contel Comments at 15-16 & n.1 (both eliminating productivity offset for carriers with less than 50,000 access lines). See USTA Rules Submission, Attachment A at 9-10. See also Alabama PSC Comments at 6 (advocating a different productivity factor for each LEC); CBT Reply at 6; USTA Comments at 19-20 (both asserting that the achievement of productivity gains may be more difficult for small LECs).

817 United Comments, Appendix A at 9-10 (proposes that the fixed productivity offset reflect the alleged fact that LECs that have already converted to digital switching have less opportunity to improve productivity); Contel Comments at 17-18 (proposes that productivity factor be reduced for carriers with high percentage of digital switching); Centel Comments at 14-15 (asserts that carriers that have already invested in new technology have less opportunity to improve productivity).

818 Centel Reply at 24-25, App. A at 1-3 (multiplying the productivity offset by variables, ranging in defined increments from .2 to 1.2, based upon the carrier's revenue weighted average rates -- relative to those of all other LECs -- for switched traffic sensitive, special access, and carrier common line rate elements; as a carrier's rates increase relative to other carriers, the size of the productivity factor variable increases).

a separate productivity offset to the cap levels of smaller LECs, asserting that they are already operating efficiently and are less able than the larger carriers to exploit scale economies to increase productivity.[819]

391. Commenting LECs of varying sizes contend that AT&T should be subject to a larger annual productivity adjustment than they are, since the interexchange portion of the network has more highly concentrated traffic and is better able to take advantage of scale economies.[820] On the other hand, AT&T and the OCCs oppose adoption of a separate productivity factor for AT&T under price cap regulation.[821] They contend that use of the CPI as an inflation adjustor already reflects economy-wide productivity gains, making adoption of a separate productivity factor unnecessary.[822] Moreover, AT&T maintains that interexchange competition should ensure that consumers benefit from increased efficiency even if the CPI itself does not capture all of its productivity gains.[823] The OCCs add that any attempt to establish a separate productivity factor for AT&T would be arbitrary and would likely interfere with the efficiency incentives price caps are intended to create.[824] One OCC states, however, that a separate productivity offset for the LECs may be appropriate.[825]

392. Other commenters, consisting mainly of users, consumer groups, and states, generally support the adoption of a productivity adjustment factor for AT&T and for the LECs.[826] However, many of these

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819 USTA Comments at 19-20; Taconic Reply at 7-8; NTCA Reply at 1-2; OPASTCO Reply at 7-8.

820 BellSouth Comments at 28-29; GTOC Comments at 23-24; United Comments, App. A at 6-7; USTA Reply at 21.

821 AT&T Reply at 28 n.**; MCI Reply at 25; US Sprint Reply at 6.

822 AT&T Reply at 28 n.**; MCI Comments at 32-36.

823 AT&T Reply at 28 n.**.

824 E.g., US Sprint Reply at 6. Cf. Western Union Reply at 2 (none of the commenters has proposed a workable productivity factor); Comptel Comments at 22 (questioning whether a reliable index of productivity changes exists and urging Commission to defer adopting any productivity factor pending further study).

825 MCI Reply at 55. The rules proposed by MCI apply only to AT&T, and not to the LECs. MCI Rules Submission, Attachment at 1.

parties express little confidence that an acceptable mechanism will be chosen due to the diversity of proposals suggested by commenting parties.[827]

ii. Discussion

393. We tentatively find that the same productivity factor ought to apply to both AT&T and all of the LECs. We note at the outset that this Commission has in the past recognized a general principle that smaller telephone companies may have fewer opportunities than larger companies to achieve cost savings and efficiencies.[828] Although many of our policy decisions have been based on this principle, in this proceeding carriers are requesting that we measure the difference in potential productivity between large and small carriers. Unfortunately, there is nothing in this record to suggest how a productivity adjustment should differ by carrier.[829] For these reasons, we do not tentatively find any basis for distinguishing between the productivity experience of AT&T and the LECs.

394. In addition, we are not persuaded by the arguments of the LECs that they will be unable to generate productivity gains as a result of characteristics that they argue differentiate them from AT&T and its productivity experience, such as size or technology currently in use. Even assuming that the size of a carrier were somehow related to productivity,

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826 See generally Ad Hoc Reply at 24-27; id., ETI Report 13-17; ICA Reply at 13; IBM Reply at 6; DOJ Reply at 35-36; Alabama PSC Comments at 6.

827 See, E.g., Ad Hoc Reply at 24; id., ETI Report at 13-17. See also Western Union Comments at 9 (points to differences in carrier operations as a hinderance to development of a workable productivity factor).

828 See, e.g., MTS and WATS Market Structure, Recommended Decision and Order of the Federal-State Joint Board, 2 FCC Rcd 2324, 2338-39, adopted, 2 FCC Rcd 2953 (1987).

829 The record presents a somewhat muddled picture of whether AT&T or the LECs would be in a better position to realize productivity gains under a price cap regime. For example, there is not even unanimity among the LEC commenters regarding whether the LECs would be better able than AT&T to achieve productivity gains. Centel maintains that "[a]s these technical changes [deployment of microwave technology, fiber optics, and digital switching systems] occur at the local level, productivity and efficiency gains among the LECs should increase at a faster rate than for the interexchange carriers during the next few years." Centel Reply at 9 (emphasis added).

size alone does not permit us to make the kind of calculations that the carriers suggest in their comments. Similarly, we do not believe productivity is likely to vary on a study area basis. As we have previously explained, total factor productivity is the best measure of a carrier's productivity gains. Nor do we believe that past investment patterns are a basis for distinguishing some carriers for the purpose of identifying a productivity factor. The evidence before us indicates that productivity increases have occurred steadily throughout the past 50 years. We have no basis to believe that these increases will suddenly cease, even for those companies that have installed some state-of-the-art technology. Similarly, a carrier's rates relative to the rates other carriers charge is no basis for applying a different productivity factor. The amount a carrier charges for a service in comparison to other carriers does not necessarily bear any relationship to productivity changes.

395. We seek further data and comment on the differences in potential productivity among individual companies. We request that the Bell Operating Companies revise the Bellcore Study to conform to the plan proposed in this Further Notice and to disaggregate the study into individual holding company results in order to clarify whether substantial differences in achieved productivity have occurred. If the major rule changes in the early post-divestiture period make it infeasible to produce revised disaggregated studies for the entire post-divestiture period, then we request that the studies be conducted for the two most recent years to indicate how prices would be different now if our proposed plan had been implemented for the October 1986 access charge filing. We also request a retrospective study from AT&T in order to help us confirm or revise our tentative conclusion that its observed productivity has been approximately 2.5 percent per year above the productivity rate embedded in the GNP-PI. We seek any other data, studies, or comments that will help determine whether significant differences in potential productivity exist among individual companies or classes of companies.

396. We also solicit additional evidence and further comments that might provide a basis for distinguishing among various carriers' potential for productivity gains. We are particularly concerned that small LECs not be burdened by a productivity factor that is so high as to discourage them from electing price cap regulation. In addition to the criteria we should employ to measure possible differences in productivity, we seek historical evidence concerning small carriers' productivity experience.

4. Other Factors

397. Most commenting parties propose to adjust price caps in accord with factors outside the carriers' control. These have often been termed "exogenous factors" or "Y factors." We continue this terminology with certain refinements. As previously noted, the terms "exogenous factors" or "exogenous costs" are used in this Further Notice to denote those changes in carrier costs that arise for reasons wholly beyond their control, and hence must be distinguished from ongoing costs that may change with the nature and magnitude of business operations. Moreover, we find that access charges have unique properties that require separate treatment in the formula detailed below. The present section describes these various possible exogenous cost changes.

a. Access Charges

398. Virtually all parties commenting on the issue assert that AT&T's price caps should be adjusted to reflect changes in access charges.[830] However, AT&T's interexchange competitors express several concerns regarding such adjustments. One OCC contends that access charges are not completely beyond AT&T's control, and thus requiring that changes in access charges be reflected in its caps may discourage AT&T from seeking to minimize access related costs.[831]

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830 AT&T Comments at 57 (proposing to flow through access charge changes, dollar-for-dollar); NYNEX Comments, App. B at 22 (testimony of Levin) (AT&T's caps should be adjusted automatically to reflect changes in price of access, such as increases in the SLC and changes in LEC access tariffs); GTOC Reply at 4 (changes in SLC and cost of access services should be flowed through to consumers through adjustments to AT&T's MTS caps). See AT&T Rules Submission, Attachment A at 4. Accord USTA Reply at 11; US Sprint Reply at 6; NTN Reply at 13; GSA Comments at 12; Joint Board Reply at 4; DOJ Reply at 34; Citizens Comments at 10; Arizona Comments at 3; Virginia Comments at 7; ALC Rules Submission at 4; API Rules Submission at 3; US Sprint Rules Submission at 8. Cf. MCI Comments at 37-39 (asserting that AT&T should flow through access charge changes fairly). But see PRTC Reply at 11 n.7 (opposing automatic price cap adjustment for access charge changes).

831 US Sprint Comments at 40. US Sprint adds, however, that in light of the significant impact access charges have on IC total expenses, on balance, price cap adjustments are appropriate. Id. Cf. PRTC Reply at 11 n.7 (opposing price cap adjustments for access charges because AT&T can control such charges through the threat of bypass and through favorable rule changes reflecting its disproportionate influence on regulators).

399. Another IC competitor argues that instead of requiring a dollar-for-dollar flow-through by AT&T of access charge reductions, it would be preferable to require that LECs reduce access charges by an amount greater than any SLC increase.[832] The carrier asserts that such a procedure would provide consumers with the full benefit of the SLC flow-through, while allowing returns in the interexchange market to reflect differing risks more accurately.[833] The carrier cautions that since AT&T and the OCCs often employ different mixes of switched and special access facilities in their networks, a mandatory dollar-for-dollar flow-through of access charge changes would affect some ICs more than others.[834] The IC concludes that for changes in switched access charges, this Commission should require that any flow-throughs be implemented on an equal percentage basis for each of AT&T's rate elements.[835]

400. We tentatively conclude that changes in the rate levels for switched and special access paid by AT&T to the LECs are exogenous costs that should trigger changes in AT&T's price cap levels. The level of access charges is determined by tariffs filed by the LECs and reviewed by this Commission. Although AT&T is free to comment on the tariffs filed by the LECs, it is this Commission, not AT&T, that chooses to permit the tariffs to take effect, to suspend or reject the tariffs, or to initiate an investigation of the tariffs. Regardless of the rate levels that ultimately prevail, the cost of switched and special access to AT&T is a cost that is determined by factors outside of its control.

401. In addition, we believe that computations for access charge cost changes should be based on AT&T's historical demand levels from the base year on which the upcoming annual tariff will be based. AT&T should therefore determine the cost impact of access charge changes by measuring the difference between historical demand times access rates in effect during the base year and historical demand times proposed rates.

402. We disagree with MCI's request to require the LECs to reduce carrier common line charges[836] by an amount greater than any subscriber

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832 MCI Comments at 38.

833 Id.

834 Id. at 38-39.

835 Id. at 39. See MCI Rules Submission, Attachment at 5.

836 MCI's comments merely refer to a reduction in "access charges," a reference that could incorporate the local service element, as well as the

line charge increase in lieu of requiring AT&T to flow through decreases in the carrier common line charge. The subscriber line charge and the carrier common line charge are the two recovery methods this Commission has authorized LECs to employ in their recovery of non-traffic sensitive (NTS) costs, such as the costs of the local loop.[837] As the LECs have increased their NTS cost recovery via the subscriber line charge, we have required AT&T to flow through to consumers AT&T's savings in carrier common line charges on a dollar-for-dollar basis.[838] This policy has produced substantial consumer benefits in the form of lower rates for interexchange calls as a result of the flow through and the demand stimulation effects produced by the rate decrease.[839] We continue to believe that consumers must benefit from cost decreases experienced by AT&T as a result of a decrease in carrier common line charges, and we will therefore not adopt MCI's proposal.

b. Changes in Tax Laws

403. Most commenters assert that price caps should be adjusted -- either as part of the annual adjustment process, or as needed -- to reflect cost changes resulting from changes in the tax laws.[840] A few commenters oppose such an adjustment, however, arguing that tax liability is largely within a carrier's control,[841] or that the effects of tax changes are too uncertain to establish an adjustment factor to reflect them.[842] Some

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carrier common line charge. From the context in which the reference appears, we believe MCI was referring only to carrier common line.

837 See MTS and WATS Market Structure, 93 FCC 2d 241, recon., 97 FCC 2d 682 (1983), further recon., 97 FCC 2d 834 (1984), third recon., 101 FCC 2d 1222 (1985).

838 MTS and WATS Market Structure, 50 Fed. Reg. 13,023 (Apr. 4, 1985).

839 See, e.g., Annual 1988 Access Tariff Filing, 3 FCC Rcd 1281 (1987).

840 AT&T Comments at 57-58; NYNEX Comments at 34; Pactel Reply at 6; USTA Reply at 22; Centel Reply at 20; Contel Comments at 19; CBT Reply at 6; United Comments, App. A at 10; PRTC Reply at 11; US Sprint Reply at 6; GSA Comments at 12; Illinois Comments at 24. Accord GTOC Rules Submission at 10; USTA Rules Submission at 4.

841 Comptel Comments at 21.

842 West Virginia Comments at 9 (noting, for example, that gross receipts taxes are separately surcharged to AT&T's customers).

commenters urge this Commission to ensure that price caps are adjusted to flow through to ratepayers the excess deferred taxes resulting from the Tax Reform Act of 1986.[843]

404. We tentatively find that fluctuations in tax liabilities resulting from changes in tax laws are exogenous costs that should be flowed through to price cap levels. Changes in tax laws result from government actions, and are not controlled by carriers. Although a carrier may advocate its views regarding government tax policies and requirements, the ultimate determination lies with governmental entities external to the carrier. We disagree with arguments that because a carrier can control its tax liability through a variety of tax planning techniques, changes in tax obligations should not be flowed through to price caps. Tax strategy has always been practiced by dominant carriers under rate-of-return regulation. The ability to shape tax obligations through planning devices does not, however, alter the underlying changes in the tax laws. The effects that these underlying tax law changes produce on carriers' costs should trigger changes to price caps. We do not believe, however, that changes in tax liability unrelated to changes in tax law should trigger a change in the price cap.

405. In calculating the adjustment for costs arising from tax law changes, we propose that carriers utilize historical costs. Under our proposal, carriers would estimate the effect of tax changes by calculating the changes in relationship to historical, known costs in a base year, as opposed to basing the calculation on estimated costs in the upcoming tariff year.

406. We also tentatively find that price caps should be adjusted to flow through to ratepayers any incremental changes in the flow back of excess deferred taxes from the amounts currently flowing back to ratepayers in 1988 rates. Pursuant to the Tax Reform Act of 1986, excess deferred taxes -- those collected based on the pre-1987 46 percent corporate tax rate, but never paid -- must be flowed back to ratepayers according to the "average rate assumption method," a mechanism that spreads the flow back to roughly the life of the property. In a rate-of-return environment, the flow back of excess deferred taxes would be accomplished through downward adjustments to individual rates. To the extent that current rates already reflect a flow back adjustment, there is no need to adjust price cap levels further to reflect the flow back unless the rate at which excess deferred taxes are flowed back changes.[844] A decrease or increase in the rate of

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843 Ad Hoc Comments, ETI Report at 13-14; DC PSC Reply at 4-5. See Ad Hoc Rules Submission at 17.

844 The action we take herein is without prejudice to any future decisions we may make concerning whether the excess deferred tax reserve is being

the flow back should trigger an adjustment to price caps.

c. Separations Manual Changes

407. Most commenting parties agree that changes in the Separations Manual should be reflected in adjustments to price cap levels.[845] However, two commenters suggest that this Commission impose a moratorium on separations changes during the initial price cap period in order to prevent any new cost shifts to the intrastate jurisdiction.[846] One commenter argues that separations changes should only result in price cap adjustments if AT&T can demonstrate that its price caps should be changed.[847]

408. We retain our tentative view, expressed in the Notice, that changes in jurisdictional separations ought to be flowed through to price caps.[848] Like access charges for AT&T, changes in jursidictional separations are decisions made by regulators over which carriers exercise no ultimate control. We disagree with suggestions that a moratorium be placed on separations changes during the initial price cap period to prevent additional costs being assigned to the state jurisdictions. Decisions concerning jurisdictional separations are intended to reflect cost-causation principles, and therefore can result in revenue requirement shifts to either the intrastate or interstate jurisdiction. A moratorium period would interfere with regulators' ability to ensure that separations rules reflect current technology in a manner that is consistent with cost-causation principles. Moreover, regulators must be able to alter separations procedures in response to both changes in technology and changes in other regulations, such as the accounting rules. We therefore believe carriers

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flowed back pursuant to the terms of the Tax Reform Act. See Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, DA No. 88-735, released May 20, 1988.

845 AT&T Comments at 57-58; NYNEX Reply at 13; BellSouth Reply at 2; Pactel Reply at 6-7; US West Comments at 39; USTA Reply at 22; USTA Rules Submission at 4; Centel Reply at 20; CBT Reply at 6; Contel Comments at 19 n.1; United Comments, App. A at 10; US Sprint Reply at 6; GSA Comments at 12; DOJ Reply at 34.

846 Bell Atlantic Reply at 7; PRTC Reply at 6.

847 Comptel Comments at 20.

848 Notice, 2 FCC Rcd at 5218 (para. 58).

should be able to flow through such separations changes.

409. We also disagree with the view that a separations flow-through to price caps should only be permitted if a carrier makes a separate demonstration of need. Changes in separations may alter carrier interstate costs either upward or downward. Cost changes should produce price cap changes in both directions, not just in cases in which costs are rising. Furthermore, we believe that adjustments should be relatively automatic. We therefore propose that carriers use historical costs as a basis for calculating the effect of separations changes.

d. Changes in International Accounting Rates

410. In the Notice, we requested comment on whether fluctuations in international accounting rates should trigger changes in price caps.[849] Only AT&T and US Sprint address the issue of whether price caps should be adjusted to reflect changes in international accounting rates, and both carriers argue against automatic adjustments.[850] They assert that since international accounting rates are the result of negotiations between the carrier and foreign authorities, they are not entirely outside of the carrier's control.[851] Consequently, automatic price cap adjustments for such changes could discourage carrier efforts to economize.[852]

411. The interaction of international accounting rates with price caps presents complex and difficult policy issues that have not been illuminated by the record to date in this proceeding. As we have discussed in our recent Notice of Proposed Rulemaking in CC Docket No. 87-494,[853] international accounting rates have not decreased in a manner proportionate to recent decreases in international message telephone rates generally. To remedy this situation, both parties commenting on this issue would permit carriers to retain as profit the amount of any decrease carriers could negotiate in international accounting rates in order to create what they

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849 Id. at 5219 (para. 63.)

850 AT&T Comments at 58 n.**; US Sprint Comments at 44.

851 AT&T Comments at 58 n.**; US Sprint Comments at 44.

852 US Sprint Comments at 44. US Sprint also proposes that each international location served by AT&T (with MTS service) should be subject to a separate price cap. See US Sprint Rules Submission at 6.

853 Regulatory Policies and International Communications, CC Docket No. 86-494, FCC 88-71, released Mar. 25, 1988.

believe is an incentive for carriers to negotiate a lower accounting rate with foreign administrations. While this type of incentive regulation is similar to our price cap regime in certain respects, we have identified two principal problems with the proposal that we believe require further comment.

412. First, to the extent a more favorable rate can be negotiated, carriers appear to reap a windfall profit solely from a change in regulatory regimes, as opposed to generating profit from the type of productivity increases we had in mind in proposing price caps, i.e., investment and other operational decisions. Second, the proposal set forth by the commenters assumes that carriers have the leverage to negotiate an accounting rate more advantageous to the interests of the United States, an assumption that may be misguided in an era of increasing international service competition and carriers' stakes in broadening their participation in foreign markets. Nevertheless, if by excluding international accounting rates from treatment as exogenous cost factors carriers would be encouraged to negotiate lower rates with authorities, then the public interest would ultimately be served. We request further comment on the treatment of international accounting rates, and tentatively decide not to treat international accounting rates as exogenous cost factors.

e. Changes in Depreciation Rates and Amortization Amounts

413. While the Notice did not specifically mention depreciation rates or amortizations as examples of exogenous costs that should trigger adjustments to price cap levels, we did seek comment on the types of costs that would warrant such adjustments.[854] While several of the commenters believe that depreciation rates and amortizations that are prescribed by this Commission represent exogenous costs that ought to trigger price cap adjustments, others disagree. The LECs generally support price cap adjustments for depreciation rate changes, including the amortization of existing reserve deficiencies and inside wire amortizations.[855] AT&T contends that changes in depreciation rates should not flow through to price cap levels, since capital recovery requirements are largely within a carrier's control.[856] However, AT&T favors an increase in its current

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854 Notice, 2 FCC Rcd at 5218 (para. 58).

855 NYNEX Comments at 34, 41; GTOC Reply, Attachment B at 7-9; USTA Reply at 22; US West Comments at 39; Centel Reply at 20; Contel Comments at 19 n.1; see NYNEX Rules Submission, Attachment (Part I) at 10.

856 AT&T Comments at 58 n.*. See also Comptel Comments at 20-21 (depreciation rates are essentially the product of AT&T's perception of its balance sheet and cash flow requirements and are typically precipitated by

depreciation rates that would trigger a one-time adjustment to its price caps.[857]

414. This Commission prescribes depreciation rates for each of the major carriers every three years, and permits carriers to request more frequent changes to their depreciation rates.[858] Depreciation represcriptions are the result of a detailed review of the factors affecting telephone plant life and salvage, and of depreciation reserve levels. These factors are discussed thoroughly by our staff, state regulatory commission staff, and the carrier. After developing represcription recommendations, we solicit public comments on the revised rates, evaluate the record, and issue a represcription Order.

415. Although the rates are established by this Commission, depreciation is not an exogenous cost that is beyond a carrier's control. In fact, the amount of depreciation expense on a carrier's books, and fluctuations in that amount, are the result of some of the most important and thoroughly considered management decisions that a carrier makes -- i.e., its capital investment decisions.[859] While represcription of depreciation lives influences the overall amount of depreciation expense, the depreciation expense level is actually more a reflection of literally thousands of decisions a carrier makes about how to produce services and goods. In large measure, how effective a carrier is in these decisions determines how productive and how efficient its operation will be. As a result, we tentatively conclude that it would be incorrect to categorize depreciation expense as an exogenous factor that could translate increased costs into higher price caps. To do so would be to establish an artificial distinction between capital costs (investment) and operational costs (depreciation expense related to that investment).

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its own proposals; therefore the need for price cap adjustments reflecting depreciation rate changes is not clear).

857 AT&T Comments at 58 n.*.

858 See, e.g., Prescription of Revised Percentages of Depreciation Pursuant to the Communications Act of 1934, as Amended, for: General Telephone Company of Florida, et al., FCC 88-7, released Jan. 22, 1988 (represcribing depreciation for 23 carriers).

859 These decisions involve questions of whether to continue to use its current plant or whether to replace it with newer, more efficient facilities, whether to forestall new plant additions and replacement plant by additional maintenance and operational expenses, and what is the most efficient mix of capital and labor expenditures.

416. Another reason leading us tentatively to conclude not to treat depreciation rates as an exogenous factor that would trigger changes in price caps concerns the methodology we employ to determine depreciation rates. In establishing depreciation lives, our policy has been to determine the actual service lives of various types of plant.[860] We do not prescribe service lives based on what we believe those lives ought to be or could be. Our determinations are made within the narrow confines of a factual inquiry into what depreciation lives will be. Thus, in prescribing depreciation lives, this Commission is essentially reacting to current information about plant life, salvage values, and how new technology is affecting these factors. We believe that this type of determination, while subject to some discretion, is not "exogenous" to the same degree as a change in tax obligations or a change in access charges.

417. Amortizations of the imbalances in the LECs' depreciation reserves and amortizations of inside wire costs present different questions and compel a different result. Depreciation reserve deficiencies represent the difference between a carrier's actual "book" depreciation reserve and the theoretical reserve that would exist had forecasts of service lives and salvage values been entirely accurate over the life of the plant.[861] Since the early 1980s, this Commission has adopted procedures designed to eliminate the depreciation reserve deficiency, which was estimated to be $13 billion for the LECs in 1986. Our most recent procedure has been the institution of a uniform, five-year amortization of the depreciation reserve imbalances of most LECs, effective January 1, 1987.[862]

418. Unlike the expenses resulting from prescribed depreciation rates, amortization costs associated with eliminating the LECs' depreciation reserve imbalances are not related to productivity. Rather, they are the result of this Commission's policies and decisions concerning the rate at which investment is depreciated and the mechanisms by which errors in

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860 See Amendment of Part 31 (Uniform System of Accounts for Class A and Class B Telephone Companies), 83 FCC 2d 267, 294 (1980) (Property Depreciation), recon., 87 FCC 2d 916, Supplemental Opinion and Order, 87 FCC 2d 1112 (1981).

861 See Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, 3 FCC Rcd 984 (1988) (Amortization Order).

862 An amortization of the depreciation reserve imbalance for AT&T was instituted in 1985, for a somewhat shorter period. Some LECs are not included in this uniform amortization because they were granted amortization before 1986. See Amortization Order at para. 26.

service lives and salvage values can be corrected. The expenses that are being recovered through the amortization are costs which, with more accurate estimates, would have been assigned to previous years.[863] Once those costs are recovered through amortization, they no longer provide a basis for carriers' rates under our traditional rate-of-return regulation. Furthermore, amortization of the depreciation reserve imbalances acknowledges the existence of a problem that we have elected to address through the use of a one-time correction device -- i.e., a five-year amortization. We therefore propose that the expiration of the amortization of depreciation reserve imbalances be reflected in a downward adjustment in a carrier's price caps.

419. Similarly, we tentatively find that the expiration of current amortizations associated with inside wiring costs should also trigger an adjustment in price caps. In the First Report and Order in CC Docket 79-105,[864] we determined that all future costs associated with the installation and maintenance of inside wiring should be expensed, rather than capitalized and placed in Account 232. We required carriers to amortize, over 10 years, costs already recorded in the capital accounts. This procedure was designed to impose more closely the costs of inside wiring on the cost-causative ratepayer. In subsequent Orders, this Commission and the Common Carrier Bureau have authorized carriers to amortize the inside wiring capital costs over a period less than 10 years, provided that such amortization does not impose undue burdens on ratepayers.[865] We stated in those Orders that it was in the public interest to remove such capital costs as quickly as possible from the rate base.

420. In the Second Report and Order,[866] we determined that the installation of simple inside wiring[867] and the maintenance of all inside wiring should be detariffed, and that all inside wiring activities should be

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863 Id. at para. 24.

864 85 FCC 2d 818 (1981).

865 See, e.g., Petition for Waiver of Section 31.232(b) of the Commission's Rules, FCC 83-585, Mimeo No. 34085, released Dec. 21, 1983.

866 51 Fed. Reg. 8498 (Mar. 12, 1986), recon., 1 FCC Rcd 1190 (1986), petitions for recon. pending, petition for review docketed sub nom. NARUC v. FCC, No. 86-1678 (D.C. Cir. Dec. 11, 1986).

867 The installation of complex inside wiring had been previously detariffed.

offered by the LECs only on a nonregulated basis. We did not require that the LECs transfer all remaining capital costs for inside wire to nonregulated activities. However, although the LECs are entitled to recover these remaining capital costs from ratepayers throughout the amortization period, the costs are not directly associated with regulated activities. Accordingly, when the carriers have recovered their capitalized costs, adjustment to regulated rates is required to acknowledge that event.

f. Other Exogenous Costs

421. A few LECs argue that equal access costs should be reflected in price cap adjustments.[868] An independent LEC observes that equal access conversion has been largely completed by the BOCs, but that other LECs continue to incur these costs. In its view, LECs will have little incentive to convert to equal access if their costs cannot be converted into higher price caps.[869] Some LECs also contend that price caps should be adjusted as a result of AT&T's movement away from leasing LEC facilities for transport and toward construction of its own facilities.[870]

422. We disagree that either equal access costs or the "cost" of AT&T bypass of LEC facilities should trigger changes in price cap levels. In proposing a mechanism that permits price caps to change according to changes in exogenous costs, we are not simply interested in identifying costs that a carrier cannot control. The exogenous factors we seek are those that are unrelated to the fundamental decisions a carrier makes that affect its productivity. Decisions concerning equal access implementation are intricately related to the future structure of the network, and hence, its productivity. Moreover, because equal access has been mandated by the courts and this Commission, we see no need to provide "incentives" for its implementation. Nor do we view the "cost" of AT&T bypass as a suitable candidate for an exogenous factor that triggers changes in price caps. Adoption of such a recommendation would tend to produce exactly the opposite incentives that we intend to create with price cap regulation because carriers would be permitted to pass through the cost of plant investment and operations to remaining ratepayers. This result is the same as that obtained under rate-of-return regulation and reduces incentives to efficiency.

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868 Contel Comments at 18-19; USTA Reply at 22; USTA Rules Submission at 4.

869 Contel Comments at 18-19.

870 United Comments, App. A at 10; USTA Reply at 22.

423. In addition to the exogenous costs named by the commenters, we propose to flow through to price caps cost changes occasioned by changes to our Part 32 rules. These rules specify carrier accounting practices for expenses, investment, and revenues. A change in accounting treatment may produce substantial changes in carrier costs and, like jurisdictional separations, is imposed by this Commission. We tentatively find, therefore, that changes to our Part 32 rules should be considered an exogenous change in carrier costs.

B. Methodology for Adjusting Price Caps

1. Summary of Notice

424. The Notice advanced several questions concerning the appropriate adjustment procedure for a price cap plan. We tentatively concluded that the plan should specify guidelines for adjustment of the cap as some function of the factors that affect the cost of service. We also tentatively concluded that the adjustment formula should, to the extent possible, match changes in specific costs with the applicable services, but that for costs that could not be so attributed, some range of discretion with respect to the flow-through of cost changes might be permitted to the carrier.[871] In addition, we requested comment on whether unused pricing flexibility should be carried forward from year to year, and on the extent to which we should take stimulation and repression into account in determining price cap adjustments.[872] Finally, we sought comment on the frequency of price cap adjustments, and whether a more general re-examination of price caps should be required.[873]

2. Frequency of Adjustments

a. Pleadings

425. AT&T and most BOCs, major independent telephone companies, and other commenting parties favor annual adjustments to price caps for at least some factors.[874] Similarly, other parties generally support annual adjustments but recommend that some recalculations be made as needed.[875] Ad

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871 Notice, 2 FCC Rcd at 5219 (paras. 66-67).

872 Id. at 5219-20 (para. 67).

873 Id. at 5220 (para. 71).

874 E.g., AT&T Comments, App. G at 3; Bell Atlantic Comments, Attachment I at 4-5; BellSouth Reply at 2; Pactel Comments at 5 & n.3; US West Comments at 27; MCI Comments at 32 n.46; GTOC Comments at 31; Centel Comments at ii, 2, 12; SNET Comments at 16; US Sprint Comments at 35-37; GSA Comments at 12; West Virginia Comments at 8; Colorado PUC Comments at 6-11; Alabama PSC Comments at 7; see US West Rules Submission, Attachment A at 14. NY EnerTel would adjust rates for capped services no more than annually. NY EnerTel Comments at 26. DOJ asserts that any price cap plan should allow for "periodic" adjustment to the caps to reflect exogenous factors. DOJ Reply at 33.

875 NYNEX would adjust the price cap annually based on the rate of

Hoc suggests that adjustments for changed regulations should occur as close to the change as possible, that adjustments for inflation should be made biennially, and that productivity should be recalculated either bienially or annually.[876]

- 426. Cable & Wireless would allow automatic adjustments only for changes to access charges that result from subscriber line charge increases ordered by this Commission. Calling for as much price stability as possible, it proposes that no other formal review procedures be implemented until after the initial three-year period.[877] Cable & Wireless would, however, permit carriers to petition this Commission for relief in extraordinary circumstances.[878] Of the other parties advocating price cap adjustments to reflect changes in access charges, few address whether AT&T should be required to flow through savings in carrier common line charges at the time subscriber line charges are increased. Many parties, however, appear to favor retention of this Commission's present policies regarding access charges, a policy that would require AT&T to flow through access savings at the time they occur.[879]

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inflation less productivity, and other adjustments would be made on a case-by-case basis. NYNEX Comments at 31. SWB would recalculate the overall price cap annually, but would account for significant changes as they occurred. SWB Comments at 36-37. USTA would adjust caps annually but would allow for unexpected changes in exogenous factors as needed. USTA Reply at 22. See also GTOC Comments at 32 (advocating adjustments as they occur). Citizens of Florida argues that carriers should be required to reduce caps automatically on an annual basis to flow through cost reductions resulting from jurisdictional separations changes, reductions in access rates, the expiration of amortization schedules, and interstate toll traffic growth. Rate reductions based upon network efficiencies and improved management would be made less frequently. Citizens Comments at 13.

876 Ad Hoc Comments at 34.

877 Cable & Wireless Comments at 17-18. See also TCA Comments at 9 (arguing that adjustments should not be made over short intervals in the interest of rate stability).

878 Cable & Wireless Comments at 18.

879 E.g., USTA Comments at 28; GSA Comments at 12. US Sprint recommends that routine adjustments be made annually at the time AT&T files new tariffs to reflect changes in access charges, and that substantial changes (those which affect AT&T's cost of providing service by more than 5 percent) should be made on an ad hoc basis. US Sprint Comments at 45. See also GTOC Comments

b. Discussion

427. We tentatively find that annual adjustments to price caps will permit rates to reflect changing costs, while ensuring that price caps retain a degree of stability that, together with other features of our price cap proposal, will help minimize disruption to ratepayers resulting from frequent rate changes. We do not believe that more frequent, or less frequent, adjustments to price caps are warranted, as some parties advocate. More frequent changes would likely result in increased rate churn, as carriers attempt to realign rates to conform to new price cap levels. Less frequent changes to price cap levels would deny carriers an opportunity to maintain rates that are reasonable for carriers as well as consumers.

428. For AT&T, we tentatively conclude that decreases in costs due to Commission-initiated increases in SLCs should be flowed through to the price cap index at the time the SLC level changes.[880] Under rate-of-return regulation, we have required AT&T to flow through the decreases in its access costs on a dollar-for-dollar basis, resulting in substantial consumer benefits in the form of lower prices for long distance service. We believe this policy should be retained under price cap regulation so that consumers will continue to benefit from the cost recovery reforms we previously have adopted. In addition, the schedule we have imposed for implementation of SLC increases calls for all increases to become effective on or before the date price caps can take effect.[881] Thus, requiring AT&T to alter its price caps to reflect cost changes from SLCs will not contribute to rate churn under price caps.

3. Adjustment Mechanism

a. Pleadings

429. Parties have proposed several different mechanisms for adjusting price caps in the second and subsequent year of price cap regulation. The more comprehensive of these proposals share several

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at 16-17 (arguing that AT&T should be required to flow through access charge changes generated from subscriber line charge changes).

880 Other changes in AT&T's costs resulting from access charges shall be reflected in the annual adjustment process.

881 See MTS and WATS Market Structure, Recommended Decision and Order of the Federal-State Joint Board, 2 FCC Rcd 2324 (1987), adopted 2 FCC Rcd 2953 (1987).

characteristics, such as distinguishing between a price cap index and an actual price index, reliance on Laspeyres-type indices,[882] and, to a lesser extent, the use of historical demand as part of the calculation.[883]

430. Pactel, for example, proposes both a methodology for calculating the price cap, and a method for updating the cap.[884] For the price cap index, Pactel proposes to use a Laspeyres-type index having an initial value of 100 that will fluctuate according to changes in inflation, productivity, and other costs. Pactel also recommends that an actual price index be created to measure actual price changes as a basis of comparison with the price cap index. Like the price cap index, Pactel's actual price index would initially be valued at 100.

431. Consistent with its proposal to cap individual services, Pactel would first determine "weighting factors" for each service. To do so, Pactel multiplies the initial price of the service by its anticipated demand during the first year of price caps to produce service-specific revenue figures, and then adds the service-specific revenues together to produce "total calculated revenue." Pactel states that the service-specific revenues are then individually divided by the total calculated revenue to determine the "weight," in percentage terms, of the service.[885]

432. By multiplying the "weighting factor" assigned to a service by 100, Pactel produces what it terms a "weighted price cap index" for each service. Together, the weighted price cap indices for all services total 100, representing the actual price cap index in the first year, according to the Pactel proposal. During the first year, any price change proposed by a carrier resulting in weighted price cap indices of less than 100 would be subject to streamlined tariff review under the Pactel plan.[886]

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882 A Laspeyres index weights individual price changes by their relative importance in some past base period.

883 Pactel Reply, App. II; AT&T Comments, App. G; NYNEX Comments, App. D; GTOC Comments, App. A. See also BellSouth Comments, App. B; AT&T Rules Submission, Attachment A at 4-5.

884 Pactel Reply, App. II.

885 Id. at 1-2.

886 To determine whether a tariff filing violates the price ceiling, Pactel would make the following calculations:

1. Multiply the proposed percentage price change for each service by the initial service-specific price index (100).

433. At the end of the first year of price caps, Pactel would add together the percentage changes in the inflation factor, productivity factor, and other costs and multiply the result by the initial price cap index (100) to produce a new price cap index.[887] Given that the new price cap index constitutes the maximum value of the actual price index, Pactel would adjust rates if necessary. When new services are added to the mix of services offered under price caps, Pactel states that it would re-calculate the weighting factors for all services, and would use the existing actual price cap index to determine the new service's weighted price cap index.[888]

434. AT&T also proposes a specific set of calculations from which price cap adjustments would be determined. AT&T distinguishes between a price cap index (PCI) that determines the maximum value of carrier rates, and an actual price cap index (API) that represents the actual value of carrier rates. To determine whether the API is less than or equal to the PCI, AT&T would first multiply historical demand for individual services by current prices. Taking the sum of these service-specific gross revenues, AT&T proposes to calculate service "weights" by computing the service-specific gross revenues as a percentage of total gross revenues.

435. To determine the percentage change in access costs, AT&T would calculate how its existing rates change under access charge flow-throughs. It then proposes to multiply these "new" rates by the amount of historical demand to produce an estimated gross revenue figure that can be compared with its current gross revenues. To determine the percentage change of its other expenses, AT&T proposes to divide the most recent

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2. The result is added to the initial service-specific price index (100) to create a new service-specific price index for each service.

3. Multiply the new service-specific price indices by the weighting factors to produce new weighted price cap indices.

4. The sum of the weighted price cap indices must be less than 100.

Pactel Reply, App. II at 4-6.

887 The percentage change in other costs is calculated by taking the cost change of the particular factor as a percentage of total calculated revenues.

888 Pactel Reply, App. II at 8-11.

three-month average of the CPI by the average of the CPI during the same three months of the preceding year. The change in its price cap index would be the sum of the change in access costs and other expenses.

436. AT&T does not explain in detail how it would calculate its API, although it does provide mathematical expressions for both indices.[889] AT&T does state, however, that it would flow through its calculation for the percentage change in access costs to its API.

437. Like AT&T, the GTOCs similarly propose a mechanism that differentiates between the movement of price caps and actual prices. Consistent with their vision of price caps, the GTOCs propose that the mechanism only be used in connection with "Category 1" services subject to caps.[890] NYNEX makes a proposal similar in some respects to that of AT&T

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889 To determine changes in the price cap index, AT&T proposes the following two-part calculation:

A. % change in the cap = (access weight x % change in access) + (all other expense weight x % change in CPI)

B. Cap Index (new) = Cap Index (current) x (1 + % change in cap /100)

AT&T's actual price index is calculated in the following manner:

A. % change in actual price =

((Demand Base x New Prices)/(Demand Base x Current Prices) - 1) x 100

B. Actual Price Index (new) = Actual Price Index (current) x (1 + % change in actual price/100)

AT&T Comments, App. G. See AT&T Rules Submission, Attachment A at 4-5.

890 In the first year of price caps, the GTOCs propose to use the following formula to determine the composite price cap:

PC1 = P1 = (PA1 * QA1 + PB1 * QB1)/(QA1 + QB1), where

PC1 = composite cap in year 1
P1 = composite price in year 1
PA1 = price of "element A" in year 1
PB1 = price of "element B" in year 1
QA1 = quantity of A units in year 1
QB1 = quantity of B units in year 1

and the GTOCs, although NYNEX notes that the use of a Laspeyres index requires the recalculation of service weights each time a new or restructured service is folded into the price cap. NYNEX's consultant therefore suggests that a Paasche-type index might be considered if weights accorded to the various services must be recalculated each year.[891] The Florida PSC also sets forth what it characterizes as a "simplified" model for calculating adjustments to price caps.[892]

438. In addition to proposals for specific adjustment formulas, parties have commented on several issues related to the mechanics of calculating price cap adjustments. USTA, responding to the issue raised in the Notice regarding matching adjustments to affected services, asserts that one of the disadvantages of a multiple price cap scheme is that changes in costs would require separate procedures to adjust each cap.[893] On the

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In the second year, the GTOCs propose the composite price cap be determined in the following manner:

PC2 = (PC1 * (1 + CPI - TFP)) +/- Y, where

PC2 = composite cap in year 2
TFP = productivity factor
Y = (cost changes due to exogenous factors)/(QA1 + QB1)

Composite price will be determined as follows:

P2 + (PA2 * QA1 + PB2 * QB1)/(QA1 + QB1), where

P2 = composite price in year 2
PA2 = price of element A in year 2
PB2 = price of element B in year 2

GTOC Comments, App. A.

891 NYNEX Comments, App. B (testimony of Levin) at 19-21, App. D. See also USTA Reply, Attachment A at 15.

892 The Florida PSC proposal segregates access charge expenses from four other categories of carrier expense, and proceeds to calculate how the other expenses would translate into a price cap adjustment. Florida PSC Comments at 10-11.

893 USTA Reply at 20.

other hand, Puerto Rico submits that exogenous changes should be flowed directly through to the part of the capped price they affect.[894] The GTOCs propose that for Category 1 services, any adjustment resulting from outside factors would be based on the percentage split of revenues between Category 1 and Category 2 services.[895] The carrier would be free to adjust Category 2 as it deemed appropriate, but Category 1 would recover only its proportionate share.[896] US Sprint advocates that adjustments should be flowed through to the particular caps affected by the adjustments.[897]

439. The Networks argue that this Commission should not presume it reasonable to apply the same inflation or other adjustment factor to the television services price cap as was applied to other caps.[898] For example, they contend that facilities approaching full depreciation are not affected by depreciation schedule changes to the same extent that other services would be, that mandated changes in jurisdictional separations have no effect on broadcast transmission because it has always been classified interstate, and that a stable service with few new facilities will not be as sensitive to the CPI or PPI as would newer offerings.[899]

440. MCI, while not proposing a specific adjustment formula, argues that changes in price caps in the second and subsequent years must be additive -- i.e., that if a carrier has not raised its actual rates to the price cap ceiling, it may carry forward this unused, but permissible, adjustment for use in later years.[900] If this method of calculating price caps is not adopted, MCI contends, carriers will have an incentive to raise prices to the maximum level permitted in any given year in order to preserve

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894 PRTC Reply at 11-12. Accord Networks Comments at 27-28.

895 For example, if an outside event caused a $10 million overall cost increase and the carrier's revenues were split on a 60/40 percentage basis between Category 1 and Category 2 services, the cap for Category 1 should be raised to allow increased revenues of $6 million. GTOC Comments at 29.

896 Id.

897 US Sprint Comments at 44.

898 Networks Reply at 7.

899 Networks Comments at 28-29.

900 MCI Comments at 30 n.43.

the maximum amount of flexibility in future years.[901] Other commenters also suggest that this Commission allow companies to carry unused adjustments forward if the adjustment is insignificant.[902] Ad Hoc, while not opposing a carry-forward mechanism, argues that a carry-forward procedure should be subject to limitations, such as permitting the technique to be used on a prospective basis only.[903]

441. Some parties argue that there should be no room for carrier discretion in the price cap plan in order to make price caps as self-executing as possible.[904] Others would allow for carrier judgment,[905] and some would assert that adjustments should be mandatory if they lower the cap but discretionary if they raise it.[906] Similarly, one carrier states that where exogenous cost changes would lower the cap, carriers should not be permitted to defer the adjustments.[907]

442. Several commenters also propose that this Commission adopt special rules regarding price cap adjustments for access charges. Some commenters assert that such flow-throughs must occur on an equal percentage basis across all rate elements to prevent AT&T from targeting rates to particular users or classes of users.[908] US West argues that AT&T should

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901 Id.

902 See, e.g., BellSouth Comments at 33 (change could be brought forward if "relatively insignificant"); Rochester Comments at 18.

903 Ad Hoc Comments at 35.

904 E.g., US Sprint Comments at 45.

905 Colorado PUC Comments at 5 ("reasonableness of return" model would allow for unused adjustments to be claimed at carrier's discretion); Arizona Comments at 4 (AT&T should be allowed to choose whether to reflect changes in factors that have "only an ambiguous relationship" to the cost of providing particular services). See also AT&T Comments at 57 n.* (exogenous factors that produce less than $100 million difference in cost would be deferred until the next annual adjustment).

906 Pactel Reply at 30 (discretionary adjustments should be limited to no more than 5 percent of annual revenues); Ad Hoc Comments at 34; ICA Comments at 22.

907 TCA Reply at 14-15.

908 MCI Reply at 30-31; NARUC Reply at 3; cf. GTOC Comments at 16 (supporting flow through of access charge changes to standard MTS users to

not be required to pass through all access charge reductions to ratepayers.[909] According to US West, so long as AT&T must pass through access savings, AT&T has an incentive to bypass the LECs' switched network. By utilizing alternative access arrangements, US West argues, AT&T can maximize its profit because any cost savings realized from alternative access can be retained as profit.[910] Bell Atlantic, while agreeing with US West, argues that this result can be avoided if AT&T is required to pass through any savings generated regardless of whether the savings stem from access rate reductions or bypass.[911]

b. Discussion

i. Use of both price cap index and actual price index

443. Price cap regulation, as reflected in our proposal, shall require that an index of the carrier's actual prices not exceed a price cap index. This will ensure that the carrier's average prices move in accordance with the underlying cost factors that we have previously described. We tentatively conclude, as several of the commenters have, that the most straightforward method of determining whether various rate levels do not exceed the price cap index is to employ an actual price index representing the weighted average of actual prices of services. We also tentatively conclude, consistent with our previous discussion of service "baskets," that a price cap index and an actual price index must be developed for each basket of telephone services offered. Both the actual price indices and the price cap indices will change over time as actual prices of capped services change and as the underlying cost factors, represented in our adjustment formulas, change.[912]

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prevent AT&T from realizing windfall benefits and from subsidizing other services).

909 US West Reply at 37-38.

910 Id.

911 Bell Atlantic Reply at 9.

912 Since the baskets have been defined in part on the basis of access charge categories, the proposed structure will satisfy several commenters' concerns that the appropriate consumers benefit from changes in access charges. Further disaggregation, e.g., to individual rate elements, is not practical, and indeed, goes beyond current practice.

444. There are several different types of price indices that might be employed to achieve our objectives. A Laspeyres index aggregates individual price movements using weights equal to the proportion of expenditures within the basket devoted to each of the elements in a base period. As a result, a certain percentage change in the price of a service that represents a very large fraction of the overall basket will lead to a correspondingly larger change in the index than an equal percentage change for a service representing a minor expenditure item. Put differently, the overall index will be more affected by a change in the price of a quantitatively important item than by an equivalent change in the price of a relatively insignificant item. This weighting principle makes the Laspeyres index a measure of the percentage change in expenditures required for consumers to purchase in the current period the exact same bundle of services as they did in the base period. Therefore, a decline in a Laspeyres index implies that consumers in the current period are better off, since last period's bundle can now be purchased at smaller total cost.

445. As has been discussed in the comments, one alternative to a Laspeyres index is a Paasche index of prices. A Paasche index uses current period quantities as weights, but as a result, its use in a price cap plan would require projections of demand in the upcoming year for which prices are being proposed in order to determine compliance with the price cap index. The need for projected current demands would result in costly and controversial preliminaries to the calculation. Moreover, the shifting weights of a Paasche index raise conceptual problems when calculating a "run" of a Paasche index over a number of years, and even make it possible for the index to change when no individual price has changed.[913] Although this is acceptable for some purposes to which index numbers are put, it may lead to results at variance with our goal that price caps will benefit consumers. We therefore tentatively conclude that a Paasche index of actual

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913 R.G.D. Allen, Index Numbers in Theory and Practice 151-54 (1975); W. Wallace & W. Cullison, Measuring Price Changes 24-27 and 46-49 (1979).

price changes should not be employed, and that we should instead employ Laspeyres indices.[914]

446. In this section, we discuss the nature and timing of changes in those indices required for the price cap plan and describe with greater specificity the indices themselves. We have also attached an appendix to this Further Notice that provides examples of several of the index adjustments that would occur under price cap regulation.[915] These examples are intended to foster greater understanding of how the price cap system would operate in the context of the tariff development process.

(A) Price cap index

447. We tentatively conclude that the price cap index (PCI) should be initialized at a value of 100 for each basket for the base period prior to the carrier's first filing under the price cap program. In each annual tariff review thereafter, we propose that its value will change in accordance with various factors that have been determined relevant to anticipated cost changes for the carriers. Changes in access charges that are caused by regulatory changes will be flowed through dollar-for-dollar to the PCI, as will changes in other costs to the extent they are caused by new or modified regulation and are hence beyond the carrier's control. The residual between total carrier revenue and access charges consists largely of operating and capital costs, and will be termed "direct expenses." Since

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914 This conclusion is that adopted in the construction of the CPI and most other price indices intended to track the effect of price changes on buyers. See, e.g., W. Wallace & W. Cullison, Measuring Price Changes (1979). In addition to the Paasche index, there are other alternatives to the Laspeyres index measure of price changes. The Divisia index has desirable theoretical properties as a measure of changes in consumer well-being, and is approximated by the Tornqvist procedure. For discussion, see, e.g., W.E. Diewart, Exact and Superlative Index Numbers, 14 J. of Econometrics 115-45 (1976); T. Cowing, J. Small, & R. Stevenson, Comparative Measures of Total Factor Productivity in the Regulated Sector, in Productivity Measurement in Regulated Industries (T. Cowing & R. Stevenson eds. 1987) at 162-64. The key deficiency with these related indices lies in the fact that they depend in part on a current-period weight, raising both the practical and conceptual problems noted above for Paasche indices. As a result, we tentatively conclude that neither the Divisia nor the Tornqvist index represents an acceptable price index for price cap purposes.

915 See Appendix D, "Calculating the Price Cap Indices: Some Examples."

these direct expenses are subject to carrier decision-making, their treatment under rate-of-return regulation will be replaced under price caps with exogenous predictors of changes in those expenses. As we have discussed, these predictors are general inflationary pressures and any distinctive productivity gains likely to be realized by the carrier.

448. The process of calculating the new value of PCI begins with a determination of access charge changes for the upcoming tariff year. Once this has been determined, the change in access costs, denoted as ΔY, is taken as a fraction of the carrier's base period gross revenues that we denote as $\Delta Y/R$. A similar computation is undertaken for any other exogenous cost change that might arise, for example, from a tax law change or accounting change. As we stated in Section V.A.1, a change in a cost amount due to the nature and extent of carrier operations by itself does not constitute an exogenous cost change. Exogenous non-access cost changes are denoted ΔZ and taken as a percentage of base period gross revenues, $\Delta Z/R$. The terms $\Delta Y/R$ and $\Delta Z/R$ may be either positive or negative numbers, depending on whether the changes in access charges and in other exogenous cost factors constitute increases or decreases in carrier costs, evaluated at base period levels of demand and operations.

449. In addition to these adjustments for access charges Y and other exogenous cost changes Z, the non-access portion of the carrier's operations must be indexed by the percentage change in GNP-PI minus the productivity percentage (expressed in fractional form). This is achieved by calculating the weight that should be attached to the non-access portion of a carrier's operations. That weight is base period gross revenues less access charges (i.e., "direct expenses") and net of ΔZ (the amount by which next period's direct costs will rise due to exogenous cost changes), all divided by base period gross revenues. This weight represents the portion of current carrier non-access operations that should be revalued by the percent change in GNP-PI less the productivity factor.

450. The new value of PCI is given by its preceding value, multiplied by one plus the sum of the fractional adjustments described above:

$$PCI(new) = PCI(base)\ [1.0 + w(GNP\text{-}PI - X)/100 + \Delta Y/R + \Delta Z/R]$$

We have previously discussed our tentative decision to employ the 75-day estimate of the GNP-PI and to adopt 3 percent as this Commission's expectation of carrier productivity gain under price caps.[916] The net result of the GNP-PI minus the productivity factor may be a positive or negative

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916 See Sections V.A.2 and V.A.3, supra.

number, depending on whether the GNP-PI exceeds or falls short of 3 percent.

(B) Actual price index

451. We propose that the procedure for calculating the actual price index (API) should be as follows. In each annual tariff filing, the carrier will propose prices for each service in a basket for the coming year. For each such service, the ratio of its proposed price to its price during the preceding base year is calculated. Subject to the banding limitations described below, this term will be multiplied by the corresponding weight that should be attached to that service. The summation of all such terms, one for each service in the basket, represents the adjustment factor that is to be multiplied by a base price index (BPI) to obtain the new API under the proposed rates. As described below, the BPI is an index of prices that took effect throughout a completed base period.

452. Specifically, after the completion of a base period, an average price for each service sold during that base period is calculated. The average price is equal to the total revenues generated under the tariff, divided by the number of units sold during the base period. Each proposed price for the coming tariff year, p2, is then divided by the average price for that service in the same base period, p1. For the purposes of calculating the API, the proposed price p2 should be interpreted as conforming to the previously described limitation that it lies within a 10 percent pricing band centered on the actual price at the end of the base period adjusted for changes in PCI.

453. The weights to be attached to these price ratios are equal to the percentages of total carrier revenues in a basket generated by each service in the base period. Denoting these weights by v and the services by the index i, an adjustment factor is calculated according to the formula

$$\sum_i v_i \, (p2/p1)_i$$

For each basket, the product of this formula is to be multiplied by the BPI to obtain the new API for the proposed prices, as follows:[917]

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917 In this formula, the bracketed material represents the change in aggregate prices from the base year to the proposed tariff year. The amount of change, muliplied by the BPI, provides the API. Another way of deriving the API is to calculate the weighted sum of percentage changes in individual prices in a manner analogous to our proposed calculations for the PCI. When written in this format, the formula would appear as follows:

$$API = BPI\left[\sum_i v_i \ (p2/p1)_i\right]$$

The BPI is derived by multiplying the BPI for the year preceding the base year by an adjustment factor similar to that just described. Specifically, the adjustment factor equals the ratio of average price for each service in the most recent base period divided by its average price in the preceding period, weighted by its revenue share in the preceding period. The process for calculating the BPI just described is essentially one of making annual adjustments to a previous BPI. Therefore, a BPI represents an original value of BPI times a series of multipliers that adjust its value to reflect prevailing prices for services during each successive base year. The BPI will be initialized at a value of 100 for the base period preceding the first filing under the price cap plan.

(C) Compliance with price caps

454. The overall rates proposed by a carrier will be deemed to be in compliance with the price cap plan only if the API for the upcoming year does not exceed the PCI for the upcoming year. It should be noted that if the carrier chooses in any year not to exercise the full pricing discretion available to it, this does not preclude it from utilizing that full discretion in future years. Therefore, if API falls short of PCI in one year, but equals it in the following year, the rate of change in actual prices in that following year will exceed the percentage change in PCI for that following year. But that can only happen to the extent that the carrier's past increase in the API fell short of increases in the PCI. Thus, consumers will be guaranteed average price changes no greater than PCI from the inauguration of this program to the current period.[918]

$$API = BPI\ [1 + \Sigma v_i\ (p2_i - p1_i)/p1_i]$$

Both formulas yield the same results.

918 Any effort to prevent the carrier from subsequently returning to the level of PCI will cause a disincentive to lowering prices below PCI in the first place, and hence, should be avoided. For this reason, changes in the PCI may not result in actual price changes to the extent the carrier previously has chosen below-cap rates. We therefore reject the suggestion of commenters who propose requiring actual price reductions corresponding to exogenous cost reductions. For possible evidence of the disincentive to lowering prices when future increases are rendered more difficult, see A. Mathios & R. Rogers, "The Impact of Alternative Forms of State Regulation of

ii. Calculating adjustments to banded rates

455. We have tentatively decided that carriers will not be granted unlimited discretion to raise and lower individual rate elements in any year. Individual rate elements will be subject to an additional restriction to limit the carrier's discretion in altering individual rates by banding the maximum movement in rates each year.

456. Bands explicitly limit the range within which the carrier may raise or lower any individual rate element in any year. The intent is simultaneously to afford further protection to consumers against excessive changes in any year, and to provide some predictability and protection to competitors of the dominant carrier from injurious pricing actions. In particular, bands will limit the increase or decrease in any rate element relative to the overall change in the PCI. This latter benchmark is employed in order that the entire price structure and any limits thereon shift proportionally with any changes in the underlying cost factors. If, for example, the PCI falls by 2 percent due to access charge changes, or perhaps more obviously if it were to fall by 20 percent, holding individual rates within some small percentage of the nominal value in the preceding year could prevent the carrier from reducing the API by the required amount. More generally, when overall rates shift with the PCI, constraining individual rates to some band around last year's nominal rates can lead to anomolous results. Hence, the bands should move with the same factors as drive the PCI, and to ensure this, the bands are defined relative to that benchmark.

457. The process of ensuring compliance with the pricing bands will be as follows. As part of the annual tariff review process, the PCI and the change from the preceding year will be calculated. The prices proposed by the carrier for the next year may not exceed those in effect six months before the year preceding that for which new rates are being proposed by more than 5 percentage points plus the percentage change in the PCI, nor may they fall short of the prices in effect at the end of the preceding base year by an amount in excess of 5 percentage points plus the change in the PCI. The price changes are then employed in calculating the API. As we have previously explained, the actual expenditures from the preceding base year are to be used as weights in the calculation.

AT&T on Direct Dial Long Distance Telephone Rates," Federal Trade Commission Bureau of Economics, Working Paper Series No. 159 (Dec. 1987) at 14-15.

458. In the event tariffs become effective that are outside the banding limitations, the calculations for the API will only credit the first 5 percentage points of movement in the rate. While a greater increase or decrease in rates may be justifiable, fully crediting the carrier with such a substantial movement in prices under the API is likely to permit shifts in the prices of other services that are more than would otherwise be desirable. Full crediting of price movements in excess of 5 percent may have the adverse side effect of increasing the amount of rate churn and rate increases elsewhere.

iii. Tariff changes other than annual adjustment

459. The Communications Act establishes a regulatory system of carrier-initiated rates, in which carriers may file new tariffs at any time. Under our proposals for price cap regulation, to obtain streamlined treatment for proposed tariff changes, a carrier that has elected to be covered by the price cap system must maintain compliance both with the banding provisions and with the price cap in the relevant service basket. We tentatively find that the procedure for establishing continuing compliance with price caps for routine rate level filings occurring during the year should be identical to that for tariffs proposed in the annual tariff filing. To be eligible for streamlined tariff review procedures, tariffs must contain rate levels within the pricing bands previously established for the tariff for that year. That range is defined by a 5 percentage point increase, or a 5 percentage point decrease, from the price that prevailed six months prior to the year preceding that to which the tariff applies, adjusted for the percentage change in the PCI.

460. Similarly, whether tariff changes maintain compliance with price caps is determined in a fashion analogous to initial compliance. The proposed new tariff is incorporated in the calculation of an API, using expenditure weights from the 12-month period ending six months prior to the year preceding that for which the proposed new tariff would apply.

iv. Abandoned services

461. A service that a carrier proposes to abandon, subject to Commission regulations, requires a determination that its abandonment will not result in the carrier's API exceeding the relevant PCI. This determination involves knowing or estimating the effective prices faced by consumers of the initial basket of services when confronted by the new basket, that does not include the service proposed for abandonment. Therefore, the original consumers of that service must be assigned to the remaining services in accordance with whatever data and estimating procedures are available to the carrier and this Commission. Once that assignment is made, a new API can be calculated and compared to the PCI for that basket. Only if the API remains no greater than the PCI, or other prices are lowered so as to bring about this result, will the proposed

abandonment conform to the price cap.

v. New and restructured services

462. As we have previously described, new services are those which are in addition to existing service offerings, while restructured services are those that represent the restructuring of a method of charging or provisioning a service, by changing or adding to a rate structure, term or condition. We tentatively conclude that new services are to be brought into the price cap system no later than the second annual tariff review that follows their introduction. This will ensure that the price cap plan continues to apply to the changing mix of service offerings, and that there is no opportunity for the carrier to price services strategically so as to gain undue profits or other advantage. Our proposed methodology will also ensure that the new service will be sufficiently established so as to generate some "weight" greater than zero in the price cap index.

463. To introduce a new service into price cap regulation, the revenue weights used in calculating the API must be calculated including the new service as part of the price cap basket for the base year that is used as a basis for the annual filing. The percentage change between the base year prices (including that of the new service), at these revenue weights, and the proposed prices (including that of the new service), at these same revenue weights, is multiplied by the base price index (excluding the new service) to produce the API for the upcoming year. It is this latter figure that will be compared to the PCI for compliance with price cap requirements.

464. For restructured services, compliance with the price cap requires a determination of the effective price change resulting from the restructuring of the method of charging or provisioning a service. In order to ensure that restructuring does not result in prices that violate the applicable price cap, this determination must be made immediately upon restructuring. As in other calculations, we want the API to measure the change in the total cost of purchasing that bundle of services that consumers actually purchased in the preceding period, when confronted with the proposed price and service changes. This calculation may require the use of carrier data and estimation techniques to assign customers of the restructured service to those services (including the new substitute service) that will remain or become available. The resulting calculation represents the API from restructuring, and will be compared to the PCI for conformity with our price requirements.

vi. Refunds

465. If a capped rate should subsequently be found unlawful as the result of a tariff investigation or complaint proceeding, refunds may be ordered and adjustments to the API and the PCI, as necessary, will be made.

In particular, if the refund affects an existing rate used to calculate the API, or affects an exogenous cost in the PCI, or the weight attached to either, appropriate adjustments may be required to ensure that cap constraints are met and that ratepayers receive the benefits of any refunds.

4. Other Proposals

466. Some commenters propose that no adjustments in price caps be made without first subjecting the change to notice and comment procedures.[919] We tentatively conclude that price cap adjustments should not be subject to notice and comment procedures. As we have previously described, annual adjustments that carriers make to price caps must be filed as part of an annual tariff filing, and will be subject to a 90-day notice period (for the LECs) or a 45-day notice period (for AT&T) under our proposed rules. Any person seeking to challenge the adjustments made by a carrier may do so prior to the annual tariff taking effect. Parties will therefore have an opportunity to challenge adjustments to the price cap index.

5. General Re-Examination of Price Cap Levels

a. Pleadings

467. AT&T, most of the BOCs and major independent telephone companies, some OCCs, and some states favor a general re-examination of price cap levels after a trial period. Several commenters propose that the initial price cap cycle last for three years.[920] Other suggestions include two years,[921] three and one-half years,[922] five years,[923] or variations

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919 GSA Comments at 12; Pactel Reply at 30.

920 AT&T Comments at 62; Bell Atlantic Comments, Attachment I at 1; NYNEX Comments, App. D at 15; GTOC Comments at 35; PRTC Reply at 6; United Comments, App. A at 11; Centel Comments at 17; NTIA Comments, Attachment at 67-68; Maryland PC Comments at 18; USTA Comments at 21; West Virginia Comments at 8-9; cf. Bell Atlantic Rules Submission, Attachment A at 3 (carriers' minimum period of election should be three years). SWB and NARUC assert that price caps should be reviewed after no more than three years. SWB Comments at 36-38; NARUC Reply at 5.

921 Comptel Comments at 24; NY EnerTel Comments at 26; TCA Reply at 3.

922 BellSouth Comments at 38; USTA Reply at 18.

923 US West Reply at 2.

thereof.[924] Some parties recommend a periodic review without specifying its frequency.[925] Arizona and the Michigan PSC also advocate ongoing review of the price cap plan.[926]

468. In an appendix to the BellSouth comments, Kahn and Shew state that the benefits of price caps could be lost if retroactive adjustments are made based on periodic review of earnings and if a periodic review of earnings is conducted too often, even if the resulting adjustments are prospective.[927] Similarly, SWB argues that retention of rate-of-return monitoring and enforcement will eviscerate the benefits of price caps.[928] DOJ also cautions against frequent, cost-based price cap evaluations, since these could induce the same type of inefficient behavior this Commission seeks to discourage.[929] Rochester argues that routine re-examination of price caps would be onerous.[930] It nevertheless suggests that this Commission should retain the discretion to reconsider a given cap after a reasonable evaluation period.[931]

469. Many commenters recommend points to consider in any fixed review of price cap regulation. Some parties urge that this Commission

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924 Pactel proposes re-examination of its "Pacific Plan" after three to five years. Pactel Comments at 6. Accord DOJ Reply at 37. US Sprint recommends an initial review period of three or four years. US Sprint Comments at 20. Ad Hoc believes that the plan should be evaluated at least every two or three years to keep pace with economic and technological changes. Ad Hoc Comments at 38-39.

925 Colorado PUC Comments at 15; Citizens Comments at 7; Florida PSC Comments at 11.

926 Arizona Comments at 4; Michigan PSC Comments at 13. Arizona states, however, that cap increases for services used by residential customers and small businesses should be subject to an automatic review if the proposed increases are substantial. Arizona Comments at 5.

927 BellSouth Comments, App. A at 22-23.

928 SWB Comments at 34-37.

929 DOJ Reply at 37.

930 Rochester Comments at 19.

931 Id.

decide whether further streamlining, or even deregulation, is appropriate at the end of the initial price cap period.[932] Other commenters assert that this Commission should re-evaluate the state of competition in the telecommunications industry.[933] In addition, some parties propose that this Commission examine carrier prices,[934] rate structures,[935] service quality,[936] subscribership levels,[937] efficiency and innovation,[938] and the availability of universal service.[939] CCTU recommends that this Commission require detailed cost data and that we establish an independent auditing body charged with detecting cross-subsidization.[940]

470. Several commenters advocate the retention of some form of rate-of-return monitoring,[941] and some support a refund mechanism for

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932 AT&T Comments at 62-63; DOJ Reply at 37-38; Illinois Comments at 21-22. US Sprint proposes that this Commission should either find that caps are no longer necessary due to increased competition, that a reversion to rate-of-return regulation is necessary due to failure of competition, or that the caps should be continued for a specific length of time but be subject to adjustment. US Sprint Comments at 17-19. But see West Virginia Comments at 4-5 (arguing that this Commission should not guarantee future deregulation at this time).

933 Centel Comments at 17; US Sprint Comments at 48.

934 BellSouth Comments at 39; United Comments, App. A at 11. The Michigan PSC suggests that this Commission develop a mechanism for customers of competitors to report any predatory pricing. Michigan PSC Comments at 13.

935 BellSouth Comments at 39; United Comments, App. A at 11; NTIA Comments, Attachment at 67-68; Citizens Comments at 7.

936 BellSouth Comments at 39; US West Reply at 32-34; United Comments, App. A at 11; Centel Comments at 17; NTIA Comments, Attachment at 67-68.

937 BellSouth Comments at 39; NTIA Comments, Attachment at 67-68.

938 US West Reply at 32-34; US Sprint Comments at 48.

939 US West Reply at 33.

940 CCTU Reply at 33.

941 US West Reply at 32; United Comments, App. A at 11; Centel Comments at 17; NARUC Reply at 5; NTIA Comments, Attachment at 67-68. But see US West Rules Submission at 3 (expressing belief that this Commission will replace rate-of-return regulation with price cap system after initial review

excessive profits.[942] US Sprint, however, argues that monitoring should be avoided. If this Commission decides to monitor, US Sprint argues that it should not require refunds in the event of excess earnings, and that it should not adjust caps based on a carrier's rate of return.[943] The GTOCs suggest that this Commission phase out all duplicative or unnecessary monitoring on a sunset schedule at the end of the initial phase. USTA argues that this Commission must define what procedures it will adopt in the event it finds unreasonably high earnings by carriers.[944] Other commenters believe that this Commission should open an evaluation proceeding.[945]

b. Discussion

471. We tentatively agree with commenters that the need for a general re-examination of price caps must be balanced against the disincentives to efficiency presented by a performance review. Carriers that fear quick recapture of any additional productivity gains they have earned will be less inclined to make efficiency-enhancing decisions initially. Thus, quick recapture of profits would replicate a flaw of rate-of-return regulation. In addition, frequent reviews increase administrative costs, for both the carrier and this Commission. On the other hand, reviews that are too infrequent run risks of unacceptable deviations from the anticipated path of prices relative to costs, as unforeseen events intrude or individually minor deviations cumulate.

472. We therefore tentatively conclude that a middle course would be optimal. A performance review of the price cap plan would be scheduled to occur at the end of the third year from its inaugural date, to be completed before the end of the fourth year of price caps. A four-year period should avoid both the problem of disincentive from too frequent

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period).

942 NTIA Comments, Attachment at 67-68.

943 US Sprint Comments at 47-48. See also Florida PSC Comments at 12 (questioning how carrier performance under price caps can be measured with rate-of-return concepts).

944 GTOC Comments at 36; USTA Comments at 21-22 (cautioning that too much emphasis on earnings will render price caps nothing more than rate-of-return regulation).

945 NARUC Reply at 5-6 (docket would re-examine rate-of-return regulation, inquire whether the price cap period should be extended, and determine the conditions for extension); Maryland PC Comments at 18.

reviews and the problem of excess deviations from infrequent review.[946] Furthermore, until a performance review is conducted, we will engage in monitoring of carriers subject to price caps.

473. The performance review will consist of a comprehensive examination of the price cap plan. It will consider all available measures of market and carrier performance, including but not limited to the level of actual prices, achieved rate of return, quality of service, and technological progressiveness. We anticipate that underachievement or overachievement with respect to these and other measures might result in adjustments to the overall level of price caps in future years. For example, persuasive evidence that productivity gains had accelerated, such as very high rates of return, might lead to an increase in the productivity factor during the next four-year period. Alternatively, abnormally low rates of return might indicate that productivity had not achieved its target and might require adjustment.

474. In addition, we tentatively conclude that no retroactive payments should be exacted from the carriers for their past "extra" productivity gains, since that would diminish the very incentive to exceed an established target. Furthermore, the productivity factor should not be changed with every modest change in the rate of return or any other factor, individually or collectively. Only if the deviation from an acceptable level is substantial and persistent should changes be undertaken. And finally, care should be exercised that the magnitude of any change not be so great as to recreate the disincentive to further productivity gains, as under rate-of-return regulation.

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946 During the initial four-year period, we would monitor price caps through our review of tariffs and the collection of data. Should it become apparent to us that the price cap program is not achieving its goals, we would initiate an earlier review of price cap regulation.

VI. IMPACT OF PRICE CAPS ON CURRENT COMMISSION RULES AND PROCEDURES

475. In the Notice, we solicited comment on a variety of Commission policies and procedures that may be affected by the transition to price-cap regulation. We proposed to continue our current policy regarding the geographic averaging of toll rates,[947] to preserve service quality protections,[948] and to retain the Separations Manual, the Uniform System of Accounts, the joint cost allocation rules, and the Interim Cost Allocation Manual.[949] The Notice also sought input regarding changes which must be made to existing Commission Rules to implement the price cap plan.[950] We discuss in this Section our tentative assessment of the impact of our proposed price cap plan on these rules and policies.

476. In addition, on January 6, 1988, we issued a Public Notice which requested that commenters file the specific rule amendments necessary to implement their own price cap plans.[951] These rule submissions were helpful to us in evaluating the various price cap proposals set forth by the parties. As we discussed in Section IV and Section V, supra, we did not adopt any single price cap plan proposed in the comments or the rules submissions. The rules we propose in this Further Notice reflect our own proposal. Nonetheless, some of the rules submitted by parties were of use in formulating our proposal, and these have been reflected in the amendments to the Part 65 and Part 69 rules we now proffer.[952]

A. Geographically Averaged Toll Rates

1. Summary of Notice

477. The Notice proposes to retain the current policy governing geographically averaged toll rates. It states that this Commission would

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947 2 FCC Rcd at 5215 (para. 43).

948 Id. at 5214 (para. 34).

949 Id. at 5220-21 (paras. 72-74).

950 Id. at 5221 (para. 74).

951 Parties in Price Cap Proceeding Requested To File Draft Rules Implementing Proposed Price Cap Plans, CC Docket No. 87-313, DA 88-6, Public Notice, released Jan. 6, 1988.

952 Proposed changes to Part 1 and Part 61 of this Commission's Rules are discussed in Section IV.D.3, supra. See also Appendix E.

not permit geographic deaveraging of service rates before completion of a comprehensive inquiry into the relationship among geographic deaveraging, universal service, and competitive pressure on dominant carriers.[953]

2. Pleadings

478. Virtually all parties that address geographic toll rate averaging -- including all commenting LECs,[954] OCCs,[955] and users,[956] and most commenting states[957] -- advocate its retention. They assert that rate deaveraging could lead to price discrimination that would threaten universal service in high-cost, thin route rural areas.[958] MCI finds these risks particularly acute, and contends that because equal access conversion has not been completed in all regions, AT&T is insulated from competition in some locations.[959] Critics of toll rate averaging argue that it is inconsistent with competition and leads to uneconomic cross-service subsidies.[960] For example, Illinois submits that individual service caps

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953 2 FCC Rcd at 5215 (para. 43). See MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, modified on recon., 48 Fed. Reg. 42,987 (Sept. 21, 1983), modified on further recon., 97 FCC 2d 682 (1983) (Reconsideration Order), modified on further recon., 97 FCC 2d 834 (1984), aff'd in pertinent part sub nom. National Ass'n of Regulatory Util. Comm'ners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985), modified on further recon., 99 FCC 2d 708 (1984), modified on further recon., 101 FCC 2d 1222 (1985), aff'd on further recon., 102 FCC 2d 849 (1985), aff'd on other grounds sub nom. American Tel. & Tel. v. FCC, 832 F.2d 1285 (D.C. Cir. 1987). In the Reconsideration Order in that proceeding, we stated that we would not allow MTS rate deaveraging "without first completing a full policy and impact review of such a fundamental pricing shift." Reconsideration Order, 97 FCC 2d at 740.

954 GTOC Comments at 34; Contel Comments at 9; USTA Comments at 28; NECA Reply at 5-6; OPASTCO Comments at 7; NTCA Comments at 5-6.

955 MCI Comments at 27; US Sprint Comments at 16.

956 API Comments at 11-12; TCA Comments at 15-16; IBEW Comments at 2.

957 Florida PSC Comments at 2; Missouri PSC Comments at 3; Hawaii Comments at 10-11.

958 USTA Comments at 28; OPASTCO Comments at 7; MCI Comments at 27; Florida PSC Comments at 2; Missouri PSC Comments at 3; Hawaii Comments at 11-12.

959 MCI Comments at 27.

and productivity gains should protect consumers in relatively high-cost locations,[961] while DOJ contends that rate averaging requirements should be abolished once AT&T faces facilities-based competition in all geographic areas.[962]

479. AT&T states that it will continue to average its rates geographically under a price cap approach, provided that it is given the flexibility to deaverage its rates to meet competition if access charges and other costs are deaveraged.[963] A few commenters are concerned, however, that price cap regulation and depooling will increase competitive pressures on AT&T to deaverage its rates.[964] NECA proposes that this Commission reduce such incentives by supplementing existing mechanisms to more closely align NECA's traffic sensitive access charges with the industry average.[965] In addition, a few parties recommend that this Commission mandate the retention of current averaging practices via a rule change,[966] while others contend that codification is unnecessary.[967]

3. Discussion

480. Geographic rate averaging has proven effective in protecting rural ratepayers and other customers of high cost LECs from unduly large

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960 See generally Illinois Comments at 24; DOJ Reply at 44-45.

961 Illinois Comments at 24.

962 DOJ Reply at 45.

963 AT&T Comments at 61-62. AT&T adds that it would commit not to abandon the provision of services to a geographic area without prior Commission approval. Id. at 34 n.*. See also DOJ Reply at 44-45 (as pooling is phased out, AT&T should be given the flexibility to charge higher rates in certain areas to the extent that access charges are higher in those areas).

964 NECA Reply at 5-6; NTCA Comments at 4-5.

965 NECA Reply at 6.

966 See, e.g., NTCA Rules Comments at 3-4; Hawaii Rules Comments at 6-7; PRTC Rules Reply at 10 (adopts Hawaii proposal).

967 See, e.g., AT&T Rules Submission at 7; cf. US West Rules Reply at 78 (agrees that geographic averaging will benefit customers, but submits that its codification is not at issue in this proceeding).

common line cost recovery burdens. In addition, averaging ensures that rural consumers benefit from increased interexchange competition in densely populated areas. Price cap regulation will eliminate neither these nor the many other advantages of geographic averaging.

481. In 1984, this Commission underscored our dedication to the maintenance of geographic averaging by implementing the common line pooling system. Local telephone companies recover almost all of their interstate common line revenue requirement through subscriber line charges (SLCs), which are flat rates assessed on end users each month, and through the carrier common line charge (CCLC), which is a charge assessed interexchange carriers on the basis of minutes of usage. The common line pool, which is administered by NECA pursuant to Commission rules, operates to ensure the continuation of geographically averaged rates by allowing high cost companies and low cost companies to assess the same CCLC. Because common line cost recovery requirements vary widely from company to company, the carriers' CCL rates would have differed significantly absent the pooling mechanism.

482. Recent amendments to the rules governing pooling alter pool administration while preserving the benefits provided to LECs and rural ratepayers. As of April 1, 1989, common line pooling will be voluntary. Since depooling carriers will set their own CCLCs, concern arose that interexchange carriers would deaverage their rates to compensate for the variation in CCLCs among local carriers. To offset the effect of low cost companies' withdrawal from the pool, we permitted carriers to meet their common line cost recovery needs by increasing their SLCs modestly and gradually up to a maximum level of $3.50 for residential and single line business subscribers. This keeps the CCLC of companies remaining in the pool at a minimum, avoiding the disparity of such charges which would otherwise result, and substantially reducing the impetus to deaverage. Because we are proposing that price cap regulation will not extend to the CCL pool, existing pooling mechanisms would not be disrupted under our approach.

483. This Commission has repeatedly voiced our support for rate averaging. For example, in Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans,[968] we found that any optional MTS offering proposing to geographically deaverage rates would be unacceptable.[969] Additionally,

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968 CC Docket No. 84-1235, Memorandum Opinion and Order, FCC 85-540, released Oct. 17, 1985.

969 Id. at para. 95.

in the Notice of Proposed Rulemaking in that proceeding,[970] this Commission extolled the advantages of geographic toll rate averaging. We stated:

> Beside[s] significantly contributing to the achievement and maintenance of universal service, geographic averaging has contributed greatly to the simplicity and clarity of MTS rates. As competitive alternatives to dominant carriers' MTS offerings grow and customers compare carriers' MTS offerings with exchange conversions to equal access, the benefits of this simplicity to consumers and competition are substantial.[971]

484. Although this Commission is protective of toll rate averaging, we have found it unnecessary to prohibit deaveraging expressly since we believe that carriers will continue their current procedures regardless of the development of competition.[972] AT&T began averaging its toll rates geographically prior to this Commission's inception, and the OCCs choose to geographically average even though they are not compelled by regulation to do so. Carriers engage in rate averaging primarily because they have strong economic incentives to average their rates. The administrative costs of deaveraging for a service as ubiquitous as MTS would be substantial. These include the costs of calculating, billing, and marketing rates for many different routes across the Nation.

485. No commenter has offered a compelling reason why price cap regulation would lead to the abolition of geographic rate averaging. We therefore see no need to alter our current policy that we will prohibit deaveraging without a full review of its impact. We tentatively conclude that deaveraging is so unlikely in the current environment that it is unnecessary for the price cap rules we are establishing to include any specific prohibitions regarding geographic deaveraging.

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970 100 FCC 2d 363 (1985).

971 Id. at 375.

972 See MTS and WATS Market Structure, CC Docket No. 78-72, Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 179, 193 (1980) (1980 Access Order).

B. Quality of Service

1. Summary of Notice

486. In the Notice, we considered the question whether the price cap model might adversely affect service quality, particularly for small business and residential users, and we solicited comments from the parties on this issue.[973] We also recognized in the Notice that if a price cap approach for AT&T or the LECs were adopted, we would need to review the many regulations and procedures currently in place to determine their role in the new regulatory environment.[974] We tentatively concluded that any possible problems in service quality that might arise under price caps could be addressed without undermining the advantages of the new regulatory regime.[975]

2. Pleadings

487. As we have already noted, parties express varying opinions regarding whether price cap regulation is likely to affect service quality adversely. However, commenters are virtually unanimous in asserting that some service quality safeguards should be maintained or developed as part of the new regulatory regime. AT&T and BellSouth disagree. They assert that no service quality safeguards would be required, since price cap regulation and competition provide the necessary incentives to maintain or improve service levels.[976] Nevertheless, BellSouth would support continuation of certain monitoring programs and the filing of technical standards in tariffs, and AT&T states that it is willing to work with this Commission to develop service quality monitoring procedures.[977] Many LECs advocate maintenance of existing safeguards, such as the service quality reporting requirements established in this Commission's Section 214 Divestiture Order approving the transfer of facilities associated with divestiture of the Bell System,[978] the reports on maintenance and

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973 Notice, 2 FCC Rcd at 5214 (para. 34).

974 Id. at 5220 (para. 72).

975 Id. at 5214 (para. 34).

976 AT&T Comments at 62; BellSouth Comments at 16-17.

977 BellSouth Comments at 16; BellSouth Reply at 9-10; AT&T Comments at 39.

978 Consolidated Application of American Telephone and Telegraph Company and Specified Bell System Companies for Authorization Under Sections 214

installation of basic services for customer premises equipment (CPE) users required by the BOC CPE Structural Relief Order,[979] tariff review scrutiny of changes in technical standards contained in current LEC interstate tariffs,[980] and the complaint process.[981]

488. Some user groups express support for service quality monitoring programs that appear similar to those endorsed by the LECs.[982] However, a number of commenters contend that existing service quality safeguards are inadequate, and that this Commission must improve monitoring techniques[983] and prescribe minimum quality standards.[984] IDCMA urges

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and 310(d) of the Communications Act of 1934 for Transfers of Interstate Lines, Assignments of Radio Licenses, Transfers of Control of Corporations Holding Radio Licenses and Other Transactions as Described in the Application, File No. W-P-C 4955, Memorandum, Opinion, Order, and Authorization, 96 FCC 2d 18 (1983) (Section 214 Divestiture Order). Commenters explicitly endorsing continuation of the reports include NYNEX, BellSouth, Pactel, and US West. NYNEX Comments at 19 n.14; NYNEX Reply at 21; BellSouth Reply at 9; Pactel Comments at 31; US West Rules Submission at 7; id., App. A at 18. Other commenting LECs or LEC groups, such as USTA and PRTC, also state generally that existing state and federal oversight of service quality should continue. USTA Comments at 13 n.16; PRTC Reply at 5.

979 Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, CC Docket No. 86-79, Report and Order, 2 FCC Rcd 143 (1987). See BellSouth Reply at 10.

980 BellSouth Comments at 17; NYNEX Reply at 20.

981 GTOC Comments at 38.

982 See TCA Comments at 15 (Commission should monitor "service restoration times, number and extent of service outages, service delivery times, technical transmission quality, and failure to meet delivery dates ...."); CCTU Reply at 33 (continued service quality monitoring of AT&T should be an integral part of price cap regulation).

983 ALC Reply at 28; IDCMA Reply at 25-27; Hawaii Comments at 10.

984 ALC Reply at 28; IDCMA Reply at 25-27. Cf. Illinois Comments at 12 (asserts that this Commission should provide minimum quality standards and enforcement procedures to ensure service quality in AT&T's non-competitive sectors, but states that this can easily be done); Ad Hoc Comments, ETI Report at 72 (stating that while state standards currently exist, this Commission should be prepared to establish quality standards if necessary).

this Commission to require carriers to file reports of circuit quality characteristics, such as C-notched noise levels for analog private lines.[985] Several parties warn that establishing more effective quality standards and monitoring procedures would be difficult and costly.[986]

3. Discussion

489. As we have already discussed in Section II.C.3.b.iii, supra, we do not believe that our price cap proposal threatens to impair service quality. Nevertheless, we intend to maintain our commitment to ensuring that carriers continue to offer high quality services to every class of customers.[987]

490. This Commission already devotes substantial resources to monitoring carrier service quality. We commonly use our authority under Section 214 of the Communications Act[988] and Part 63 of this Commission's Rules[989] to monitor service quality in connection with carrier applications to construct, extend, acquire, or operate communications lines, or to discontinue services. The Section 214 application process provides this Commission with the opportunity to develop data not merely on specific service failures, but on the general state of the network as a whole. For instance, in a recent Order and Authorization concerning AT&T's 1988 annual "blanket" Section 214 application, the Chief, Common Carrier Bureau, acting on delegated authority, explained:

> [AT&T's] annual Blanket Application ... serves as a vehicle to keep the Commission informed as to the technological and economic developments of the single largest communications network

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985 IDCMA Reply at 26.

986 See, e.g., DOJ Reply at 28 (regulatory monitoring of service quality is difficult and costly because quality problems are hard to detect and monitoring would require this Commission to second-guess business decisions).

987 Under Section 1 of the Communications Act, 47 U.S.C. § 151, this Commission must regulate interstate telecommunications "so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges ...."

988 47 U.S.C. § 214.

989 47 C.F.R. §§ 63.01 et seq.

and service provider in the United States. As part of our analysis of the Blanket Application, we develop and track various historical statistical summaries that relate to the efficiency of the network. In addition to factors and data concerning efficiency of usage, timely incorporation of new technical developments, and long term trends in services and quality of service, we also monitor the number of messages handled by the network and the utilization of the circuits used to carry these messages .... Network performance and construction needs are evaluated using statistical and mathematical procedures that assess and track certain indicators, or metrics, which serve as measurable surrogates for performance and efficiency.[990]

491. Section 214 also has provided this Commission with a flexible tool with which to identify or correct specific problem areas. Under Section 214(c) we can attach conditions -- such as service quality reporting requirements -- to facilities authorizations, and carriers may not commence or proceed with construction or other activities subject to prior approval by this Commission under Section 214, unless the conditions attached to their authorizations are met.[991] Pursuant to conditions established in the Section 214 Divestiture Order, this Commission's Common Carrier Bureau currently receives semi-annual quality of service reports from both AT&T and the RBOCs. The RBOC reports cover: (1) customer satisfaction levels, broken down into residence, small business, and large business subcategories; (2) percent of switching machines performing at or above dial tone speed objectives; (3) percent of offices meeting all transmission objectives; (4) percent of calls encountering equipment failure or blocking; and (5) percent of "on time" responses to service orders.[992] Similarly, AT&T's reports measure, among other things, switching machine performance, interLATA transmission quality, and equipment failure or blocking on the terminating access network.

492. Each of the reporting categories required as a result of the Section 214 Divestiture Order provides an important measure of service

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990 Application of American Telephone and Telegraph Company and Specified AT&T Communications Companies, File No. W-P-C-6035, Order and Authorization, 2 FCC Rcd 6733, 6733 (para. 3)(1987)(footnotes omitted).

991 Section 214(c) of the Communications Act, 47 U.S.C. § 214(c), states, in pertinent part, that "[t]he Commission ... attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

992 See Section 214 Divestiture Order, 96 FCC 2d at 76-84, 92.

quality levels, designed to enable us to detect potential adverse trends in quality standards or performance. Customer satisfaction data, segregated by customer category, permits this Commission to monitor not only overall service standards, but also potential unevenness in service quality. Reports on switching and dial tone speed reflect perhaps the most obvious and immediate problems that could cause customer dissatisfaction.993

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993 In fact, severe dial tone delays in a number of offices were a prominent feature of the pre-divestiture Bell System's widely publicized "service crisis" in 1969. See, e.g., Dial Tone Delays Reported in City, N.Y. Times, Apr. 10, 1969, at 34. The service quality problems faced by the Bell System in 1969 also illustrate the role this Commission can play in monitoring service quality and taking affirmative action if necessary:

> The FCC got into the act by requesting a meeting with the nation's telephone companies to discuss the complaints about service in New York, Florida, and elsewhere. At the Commission's request, AT&T began to furnish it with a monthly report on its service quality, measuring it on a scale with well over a dozen dimensions and indicating 'weak spots' in any dimension in any region of the country.

P. Temin, The Fall of the Bell System 55-57 (1987) (footnote omitted). See FCC Seeks Data on Phone Service, N.Y. Times, Aug. 16, 1969, at 1. It is also instructive to note that some analysts have concluded that the Bell System service quality crisis in the late 1960s resulted in large measure from the operation of rate-of-return regulation:

> A series of actions taken by the Federal Communications Commission in the mid-1960s led to a comprehensive agency review of the Bell System's rate-of-return. As a result, telephone company stock prices declined in the middle 1960s, even though prices in the stock market as a whole were rising. Attempts were made to compensate for a declining price-earnings ratio by increasing net earnings. These efforts took many forms, including that of not increasing capital outlays in 1966-67, a time when demand growth in several areas exceeded switching capacity. The resulting capacity shortages caused serious declines in service quality, with service interruptions in major East Coast cities during 1967-1968. By 1969, service throughout the urban regions of the eastern part of the country was beset by delays in dial tone, repairs, installation of new equipment, and long-distance call completion at

Transmission quality is another important measure of service; perceptible noise or inadequate signal amplitude clearly is objectionable to customers. Reports on signal blocking can be an important gauge of equipment failure or lack of adequate facilities. Finally, customers would likely view delays in receiving service as a failure in the serving company's management, and reports showing increases in such delays could yield advance indication of overall service deterioration.

493. This Commission has available a variety of additional regulatory tools to ensure high quality telecommunications services. We have the power to scrutinize changes in technical standards contained in interstate tariffs as part of the tariff review process under Part 61 of our Rules.[994] Aggrieved parties may utilize the complaint process under Section 208 of the Communications Act[995] to seek redress in cases where substandard service levels may violate the Act or this Commission's regulations. Moreover, in appropriate cases, upon complaint or our own initiative, Section 214(d) empowers this Commission to "require by order any carrier ... to provide itself with adequate facilities for the expeditious and efficient performance of its services as a common carrier ...."[996]

494. We also recognize our responsibility under Section 1 of the Communications Act to ensure that regulatory changes do not degrade service quality in such a way as to harm national security and emergency preparedness (NSEP).[997] In this regard, we note that in addition to the service quality safeguards discussed above, the Section 214 Divestiture Order requires AT&T and the BOCs (through Bellcore) to file with this

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peak periods, particularly in the Bell System companies.

A. Carron & P. MacAvoy, The Decline of Service in the Regulated Industries 37 (1981)(footnotes omitted); see Section II.C.3.b.iii, supra.

994 47 C.F.R. §§ 61.1 et seq.

995 47 U.S.C. § 208.

996 47 U.S.C. § 214(d).

997 Section 1 of the Act, 47 U.S.C. § 151, provides that this Commission was established in part "for the purpose of the national defense, [and] for the purpose of promoting safety of life and property ...." We have concluded that, although NSEP concerns were not expressed by any parties in comments regarding the Notice, the importance of this issue warrants our drawing parties' attention to it at this time.

Commission annual reports regarding the effectiveness of NSEP planning and operations.[998] We tentatively conclude that, as with service quality in general, price cap regulation will not adversely affect NSEP efforts.

495. After considering the parties' comments, and cognizant of our duties under the Communications Act, we tentatively conclude that it is necessary and sufficient to retain under price caps our existing service quality safeguards, including those discussed above.[999] Nevertheless, we recognize that there may be alternative effective and efficient methods of ensuring quality telephone service. Parties urging this Commission to develop additional safeguards should identify with specificity what standards, technical or otherwise, we should adopt, and why their adoption would be appropriate.[1000]

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998 96 FCC 2d at 92.

999 We note that many tariffs currently contain technical standards relevant to service quality. Under our proposal, only rate level changes would be subject to streamlined tariff review procedures. Such treatment does not extend to changes in tariff terms and conditions, including technical standards. Changes in such terms would remain subject to traditional scrutiny. See Section IV.D, supra.

1000 As several commenters note (e.g., USTA Comments at 13 n.16; Ad Hoc Comments, ETI Report at 72), many state regulatory commissions are active in establishing and monitoring service quality standards for the intrastate operations of both interexchange and local exchange carriers. NARUC has maintained, and updated as recently as July 1987, Model Telecommunications Service Rules for LECs. We already examine these state efforts on a regular, albeit informal, basis. We seek comment on whether it would be in the public interest to incorporate any such standards into our existing monitoring procedures, and on how that could be accomplished.

C. Other Rules and Procedures

1. Separations Manual, Uniform System of Accounts, Joint Cost Rules

a. Summary of Notice

496. Because we proposed in the Notice to retain the current procedures regarding the separations process, we saw a "continuing need" for the Uniform System of Accounts (USOA).[1001] The Notice was less certain, however, as to the continuation of the standards and rules for cost allocation between regulated and unregulated activities that were articulated in CC Docket No. 86-111[1002] and codified at Section 64.901 of this Commission's Rules, 47 C.F.R. § 64.901. As we noted, though the price cap model in its purest form would eliminate the incentives for rate base inflation and cross-subsidization, the plan that would best fulfill our duties under the Communications Act does not entirely abolish such incentives.[1003]

b. Pleadings

497. Commenters uniformly advocate retention of jurisdictional separations rules under price cap regulation,[1004] although several express concern as to implementation of the separations process in a price cap environment,[1005] or assert that the current rules should be simplified.[1006]

1001 2 FCC Rcd at 5220 (para. 72).

1002 Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (Joint Cost Order), modified on recon., 2 FCC Rcd 6283 (1987).

1003 2 FCC Rcd at 5220 (para. 73).

1004 E.g., Bell Atlantic Reply at 7; Pactel Comments at 40 n.59; SNET Comments at 23; Ameritech Comments at 40-41; Rochester Comments at 19; Western Union Comments at 9; Colorado PUC Comments at 2.

1005 E.g., Networks Reply at 15; OPASTCO Comments at 5. NARUC cautions that price caps should have no effect on jurisdictional allocations, intrastate rates, or intrastate services. NARUC Reply at 4-5.

1006 E.g., SNET Comments at 23. Cf. Colorado PUC Comments at 2 (since the separations process is one of the most difficult aspects of rate regulation, the administrative burden under price caps will not be materially less than under rate-of-return regulation).

Small LECs question the continued viability of the Universal Service Fund under a price cap approach.[1007] They encourage retention of those portions of the separations rules that require the submission of cost data which determine eligibility for Fund contributions.[1008] Similarly, all commenters addressing the issue support retention of the USOA under price cap regulation.[1009]

498. Although dominant carriers are divided as to whether the joint and common cost allocation procedures detailed in the Joint Cost Order should be retained under price cap regulation,[1010] most other commenters support the continued use of these rules.[1011] Parties advocating retention of the joint cost procedures stress the need for continued protections against cross-subsidies and strategic pricing.[1012] Commenters urging elimination of the joint cost rules contend that they are not necessary

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1007 OPASTCO Comments at 5. See USTA Rules Submission at 2 (rules proposed by USTA do not alter "support flows" contained in Unity 1-A agreement).

1008 NTCA Reply at 3-4.

1009 E.g., Pactel Comments at 39-40; BellSouth Comments at 52; SNET Comments at 22; United Comments at 19; Ameritech Comments at 40-41; Rochester Comments at 19; CP National Comments at 3-4; Western Union Comments at 9.

1010 Ameritech, NYNEX, Pactel, and CP National support retention. Ameritech Comments at 40-41; NYNEX Comments at 37; Pactel Comments at 39-40. BellSouth, Contel, SNET, and Rochester propose elimination. BellSouth Comments at 53; Contel Comments at 19-20; Contel Reply at 9; SNET Comments at 23; Rochester Comments at 19. AT&T also advocates elimination but suggests that if this Commission continues earnings monitoring for some period, it should retain the rules temporarily. AT&T Comments at 70 n.*.

1011 E.g., ADAPSO Reply at 12-13; IDCMA Reply at 28; IBM Comments at 7-8; Ad Hoc Comments at 37; Maryland PC Comments at 16-17; New York DPS Comments at 17-18. Cf. EDS Comments at 15 (urges AT&T's continued compliance, but states that the carrier should not have to file reports unless requested by this Commission, sua sponte, or by a third party in a complaint proceeding); Michigan PSC Comments at 18 (advocates establishment of updated cost allocation procedures). But see DOJ Reply at 45-46 (proposing elimination of joint cost allocation procedures for AT&T).

1012 E.g., Ad Hoc Comments at 37; IBM Comments at 7-8; ESPA Comments at 4; ADAPSO Reply at 12-13; IDCMA Comments at 11-13.

under a price cap system because carriers would have no incentive to engage in cost shifting.[1013] Moreover, they argue, continuation of existing cost accounting rules could prolong current regulation-induced inefficiencies.[1014]

c. Discussion

499. The policies and requirements contained in the recently revised Separations Manual reflect the joint efforts of the state jurisdictions and this Commission to fashion and implement fair and reasonable jurisdictional cost allocation rules, and we have no desire to alter or affect the operation of those policies and requirements. Moreover, we believe that our USOA and joint cost allocation rules should continue to operate in a price cap regulatory system in order to monitor carriers' regulated activities, protect against any risk of cross subsidy, and permit continued use of the current Separations Manual. We therefore have decided that no changes to the Separations Manual, the USOA, or the joint cost allocation rules will be proposed in this Further Notice.

500. None of the commenters suggests elimination of the Separations Manual or the USOA. The existing separations process not only ensures that each regulated cost is recognized in only one jurisdiction, it provides data necessary to monitor the effects of price cap regulation on interstate operations. Separations procedures have recently undergone a major revision,[1015] and we perceive no need to initiate a re-write of the rules so soon afterward. We have also tentatively decided to retain the USOA. Uniform accounting is needed to monitor the success of the price cap plan, and is the basis for our existing separations procedures as well as the joint cost allocations we have approved.

501. The joint cost rules provide for the allocation of costs between regulated and nonregulated services, a process that is performed prior to separating regulated costs between the interstate and intrastate jurisdictions. Jurisdictional separation of regulated costs cannot occur before those costs are segregated from nonregulated costs. In addition, retention of these rules is essential if this Commission is to continue to

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1013 AT&T Comments at 69-70; BellSouth Comments at 53; Contel Comments at 19-20; SNET Comments at 23; Rochester Comments at 19.

1014 AT&T Comments at 69-70; DOJ Reply at 46.

1015 Amendments of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, Report and Order, CC Docket Nos. 86-297, 80-286, and 78-72, 2 FCC Rcd 2639 (1987).

monitor carriers' regulated activities. In light of our commitment to the existing separations process, and because the procedures articulated in the Joint Cost Order and codified at Section 64.901 of this Commission's Rules, 47 C.F.R. § 64.901, will continue to serve ratepayer interests in the price cap environment, we propose to retain these rules.

2. Interim Cost Allocation Manual

a. Pleadings[1016]

502. Few parties address the proper role of the Interim Cost Allocation Manual (ICAM) in a price cap environment.[1017] AT&T asserts that this Commission should discontinue use of the ICAM, regardless of whether price caps are adopted.[1018] It contends that the arbitrary cost allocations among regulated interstate service categories required by the ICAM are incompatible with efficient pricing, impair competition, and, even under rate-of-return regulation, cannot be used to measure earnings in an economically meaningful way.[1019] Moreover, AT&T argues, price caps themselves act as a better deterrent to cross-subsidization than does the ICAM, since caps would prevent the regulated carrier from raising prices sufficiently to recoup the losses associated with the subsidized service.[1020] A few other commenters state generally that cross-subsidization remains a risk under price cap regulation and that cost allocation procedures should be retained.[1021]

1016 The Notice generally sought comment regarding whether we should continue to apply the Interim Cost Allocation Manual, Part 63 rules, Part 65 rules, and Part 69 rules as part of a price cap system. Notice, 2 FCC Rcd at 5221 (para. 74).

1017 We prescribed the ICAM in AT&T, CC Docket No. 79-245, recon. granted in part & denied in part, 86 FCC 2d 667 (1981), aff'd sub nom. MCI Telecommunications v. FCC, 675 F.2d 408 (D.C. Cir. 1982), modified, 94 FCC 2d 1113 (1983).

1018 AT&T Reply at 61.

1019 Id.; AT&T Comments at 68-69.

1020 AT&T Comments at 68-69.

1021 E.g., ANPA Reply at 8-9.

b. Discussion

503. Because we have proposed an optional no-suspension zone within our traditional regulatory framework, dominant carriers may choose to continue operating under rate-of-return regulation. If so, the ICAM must remain in place to ensure proper cost allocation. If AT&T opts for price caps, however, we propose to discontinue use of the ICAM. Continued operation of the ICAM would unnecessarily limit AT&T's flexibility to adjust rate levels within the applicable cap and band constraints. We therefore tentatively conclude that the ICAM will be retained unless AT&T elects price cap regulation. If AT&T does opt for price caps, we propose to require AT&T to adhere to the cost allocation requirements we have proffered for the LECs for all of its exogenous adjustments, including access costs.[1022]

3. Part 63 Rules

a. Pleadings

504. Parties commenting on this subject generally contend that the Part 63 rules, which discuss extension of lines and discontinuance of service by carriers, should be modified or eliminated under a price cap regulatory system. Those urging deletion of the Part 63 rules contend that since there is no rate base under price cap regulation, there should be no need to scrutinize the prudence of investment decisions.[1023] AT&T agrees, noting that price caps would discourage rate base padding by severing the direct tie between earnings and capital investment.[1024] Nevertheless, while it discounts concerns that it might abandon service to communities with few competitive alternatives in the absence of "exit controls," AT&T is amenable to partial retention of the Part 63 rules to assuage such fears.[1025] Thus,

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1022 The rule we propose to apply to the LECs appears as § 69.415 in Appendix E.

1023 BellSouth Comments at 54; Rochester Comments at 19-20; SNET Comments at 23. Compare Pactel Comments at 39 (Part 63 rules should remain unchanged under price cap regulation) with Pactel Reply at 61-63 (to the extent that Part 63 rules are designed for regulation of prudence of investment, those aspects of the rules should be waived for carriers subject to price caps).

1024 AT&T Comments at 72-73.

1025 Id. at 73-74. AT&T concludes that competition is the best allocator of resources and that inefficient exit controls are not sustainable in a competitive market over the long run, particularly when applied only to AT&T. Id.

AT&T recommends that, like the OCCs, it be accorded streamlined treatment under the Part 63 rules, with temporary continued enforcement of the application and approval requirements for service discontinuances.[1026]

b. Discussion

505. We tentatively conclude that continued enforcement of the Part 63 rules is proper within the price cap framework. The Part 63 rules in their present form provide this Commission with a vehicle to determine whether particular facilities are inefficient or unnecessary in keeping with our duty to safeguard the public interest. There is no persuasive evidence that the current approach is burdensome. In fact, Section 63.06 affords carriers a great deal of flexibility in choosing the form of the application they file. We tentatively conclude that continued application of the Part 63 rules under price cap regulation would provide an additional means of monitoring dominant carrier behavior and, therefore, we propose to retain these rules.

4. Part 65 Rules

a. Pleadings

506. While agreeing that some unintrusive monitoring of total interstate earnings may be appropriate under price cap regulation,[1027] dominant carriers contend that the Part 65 rules should be deleted,[1028] waived,[1029] or substantially modified.[1030] They claim that retention of Part 65 procedures could reduce incentives to maximize efficiency while restoring incentives to cross-subsidize unregulated offerings.[1031]

1026 AT&T Reply at 63-64; AT&T Comments at 73-74. Cf., Michigan PSC Comments at 18 (Part 63 rules should be modified).

1027 E.g., AT&T Reply at 60; SWB Comments at 4; BellSouth Reply at 20; SNET Comments at 20-21; Contel Comments at 20-21. But see Bell Atlantic Reply at 17-18 (opposing rate-of-return monitoring as unnecessary "dual regulation").

1028 E.g., AT&T Reply at 60; Bell Atlantic Reply at 17-18; BellSouth Comments at 53; NYNEX Comments at 38-39; SNET Comments at 23.

1029 US West Comments at 47.

1030 E.g., United Comments at 19.

1031 E.g., SWB Comments at 4; Centel Reply at 15-16; SNET Comments at

507. Several carriers suggest alternative methods of earnings monitoring. For example, BellSouth proposes that this Commission rely upon financial reports to shareholders and to the Securities and Exchange Commission, and upon the annual Form M filings as tools for monitoring carrier earnings prior to the comprehensive review of the price cap plan.[1032] Other LECs suggest that this Commission should eliminate quarterly rate-of-return reports, rate-element-specific rate-of-return monitoring, and the biennial represcription process, and replace these procedures with the requirement that carriers issue single rate-of-return reports at the time of comprehensive review.[1033] NECA contends that if this Commission adopts price cap regulation we should relieve pooling LECs of the Docket 84-800 monitoring and refund requirements.[1034] It maintains that these procedures were established to enable this Commission to manage the task of prescribing and enforcing rates of return for the industry as a whole, and would be unnecessary solely for the NECA pools when pool performance could be reviewed on an individual basis.[1035]

508. Most remaining commenters addressing this issue emphasize the importance of maintaining reliable means of monitoring carrier earnings under price cap regulation.[1036] Ad Hoc contends that the reporting

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19-21. Accord DOJ Reply at 26-28; British Telecom Comments at 8. Cf., NYNEX Comments, App. B at 13-14 (testimony of Levin) (Part 65 procedures are unnecessary to detect cost-reducing changes in technology, which can be identified more efficiently through the trade press or reports to this Commission and can be dealt with, as necessary, through price cap adjustments).

1032 BellSouth Reply at 20. See also SWB Comments at 4 (rate-of-return reviews should be infrequent and limited to total interstate earnings).

1033 United Comments at 19. See also SNET Comments at 19-21 (monitoring for "excess earnings" should be confined to total aggregate interstate revenues and expenses and should be withheld until the time of the comprehensive review at the end of the initial price cap period).

1034 NECA Reply at 2.

1035 Id.

1036 See, e.g., Ad Hoc Reply, ETI Report at 41-42; Ad Hoc Comments at 35; Virginia Comments at 7; Michigan PSC Comments at 18; New York DPS Comments at 14-15; Colorado PUC Comments at 4; Maryland PC Comments at 10-11. But see US Sprint Reply at 6-7 (opposing rate-of-return monitoring as a form of "dual regulation" that will encourage cross-subsidization).

requirements developed in Docket 84-800 and Docket 86-182 should be maintained, but that the (now judicially suspended) refund requirements "should be subject to provisional changes."[1037] Others state generally that tools must be retained to ensure that carriers do not reap excessive profits under a price cap regime,[1038] and note that rate-of-return procedures may need to coexist with price caps for some transitional period.[1039]

b. Discussion

509. Because we propose that price cap regulation will be an optional undertaking, we tentatively conclude that our current Part 65 rules should be retained. This Commission will not disturb the operation of rate-of-return regulation for carriers which choose to continue under the current system. We propose modifications to Part 65, however, for those carriers opting for price cap regulation. For example, we have added a qualified overall exemption from Part 65 for carriers subject to price caps, and have specifically excluded them from Sections 65.200 and 65.703(a), (e), and (f).[1040] In addition, we have added subsection (c) to Section 65.701 to extend to March 31, 1989, the final period of rate-of-return review for carriers electing price cap regulation. New Section 65.701(g) proposes a transitional mechanism for carriers subject to price cap regulation which need to discharge refund obligations incurred prior to entering price caps.

510. We have also proposed several additions to Section 65.600, which prescribes the form and content of rate-of-return reports. Carriers remaining under rate-of-return regulation shall continue to file the quarterly and annual reports detailed in Section 65.600(b). New subsection (d) provides that an interexchange carrier electing price cap regulation must annually file a report of its total interstate rate of return. New subsection (e) imposes the same requirement on LECs choosing price cap regulation and provides for the maintenance of rate-of-return regulation for the common line element of access, which will continue to be reported

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1037 Ad Hoc Reply, ETI Report at 41-42. See also Ad Hoc Comments at 37-38 (proposing that the Industry Analysis Division of the Common Carrier Bureau be required to prepare annual reports comparing carrier costs and revenues on a disaggregated basis to enable a determination of whether the level of disaggregation within a price cap category is sufficient to prevent cross-subsidies).

1038 New York DPS Comments at 14-15; Ad Hoc Comments at 35.

1039 Colorado PUC Comments at 4; Maryland PC Comments at 10-11.

1040 See Appendix E.

pursuant to subsection (b). Carriers filing common line rate-of-return reports shall complete only those sections of Form 492 that relate to calculation of the common line rate of return, namely Sections 1, 2, 3(A)(1) through (5), 3(B)(1) through (8), 6, and 7. We seek comment on whether these proposals or different reporting requirements would be appropriate.

5. Part 69 Rules

a. Pleadings

511. Virtually all parties commenting directly on the issue assert that most of the access charge allocation rules set out in Part 69 could be eliminated,[1041] or at least waived,[1042] under price cap regulation. The LECs explain that Part 69 allocates costs among rate elements using a fully distributed cost methodology, while under price caps carriers should be free to price their services in accordance with market demand so long as the cap is not exceeded.[1043]

512. Most carriers concede, however, that those sections of Part 69 dealing with subscriber line charges,[1044] NECA pool long-term support flows,[1045] and the Universal Service Fund[1046] need to be retained under a price cap regime, at least initially.[1047] For example, as part of the depooling provisions in USTA's "consensus" LEC plan, participating carriers would continue to calculate common line revenue requirements in accordance

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1041 BellSouth Comments at 53; NYNEX Comments at 40; Contel Comments at 19-20; CBT Reply at 9; Rochester Comments at 19-20; United Comments at 20; SNET Comments at 24.

1042 Pactel Comments at 42-44.

1043 E.g., BellSouth Comments at 53; NYNEX Comments at 40; SNET Comments at 24.

1044 Bell Atlantic Reply at 7; United Comments at 20; NECA Reply at 4.

1045 NYNEX Comments at 40; Pactel Reply at 63; USTA Reply at 26-27; NECA Reply at 4.

1046 E.g., Bell Atlantic Reply at 7; Pactel Reply at 63; NECA Reply at 4.

1047 Several commenters note that NECA and the non-pooling carriers should eventually be able to develop an independent mechanism for calculating support flows that will permit the elimination of all Part 69 rules. NYNEX Comments at 40; Pactel Reply at 63.

with many of the Part 69 rules, particularly Section 69.105 and Subparts D and E.[1048]

513. Similarly, NECA asserts that this Commission should retain the Part 69 rules pertaining to: (1) NECA's functions and responsibilities; (2) long-term and transitional support; (3) billing for the Universal Service Fund and lifeline fund assistance; (4) reduction or waiver of the end user common line charge; (5) end user common line charge transition; and (6) pooling options.[1049] It also contends that this Commission should modify existing cost allocation rules for NECA and any carriers remaining under rate-of-return regulation, so that the level of rate element aggregation used in determining their rates is roughly comparable to that applicable to carriers governed by price cap regulation.[1050]

b. Discussion

514. As we have done with other rate-of-return regulations, we tentatively propose to retain Part 69 for those carriers continuing under rate-of-return regulation and to modify Part 69 for carriers regulated under price caps. Our proposal is to continue to apply to price cap carriers those sections of Part 69 that mandate rate structure for access services, while exempting price cap carriers from rules that mandate rate level calculations based on rate-of-return concepts.

515. In addition, we propose to exempt price cap carriers from the cost allocation rules established in Part 69, and to impose a price cap cost allocation rule on all participating carriers that requires the allocation of exogenous cost factors on a cost causative basis for the purpose of distributing exogenous cost changes among the relevant price cap indices. This proposal provides carriers with the freedom to adjust price levels within cap and band limitations without the requirements imposed by traditional fully distributed cost allocation requirements. At the same time, it ensures that exogenous cost factors are flowed through to the price cap for the relevant basket of services.

1048 USTA Reply at 26-27.

1049 NECA Reply at 4.

1050 Id.

VII. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

516. We certify that the Regulatory Flexibility Act[1051] is not applicable to the rule changes we are proposing in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of a summary of this Further Notice in the Federal Register.

517. As part of our analysis of the proposal described in this Further Notice, however, this Commission has considered the impact of the proposal on small telephone companies, i.e., those serving 50,000 or fewer access lines.[1052] The action proposed herein would have a beneficial economic impact on all such telephone companies because the proposed price cap plan will provide these carriers with an incentive to reduce their costs and thus increase the level of their productivity and earnings. Moreover, the elective nature of the proposed plan will give each small carrier an opportunity to refrain from becoming subject to price cap regulation if it decides that such regulation is not well suited to its particular circumstances.

VIII. PAPERWORK REDUCTION ACT ANALYSIS

518. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease the information collection burden on the public. We specifically refer to our proposal that local exchange carriers electing price cap regulation file a partial Form 492 covering only the common line element of access. This would include solely Sections 1, 2, 3(A)(1) through (5), 3(B)(1) through (8), 6, and 7 of Form 492. This proposed reduction in the information collection burden is subject to approval by the Office of Management and Budget as prescribed by

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1051 5 U.S.C. § 601, et seq. (1987).

1052 Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. See MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

the Paperwork Reduction Act.

IX. EX PARTE REQUIREMENTS

519. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that ex parte presentations are permitted except during the "Sunshine Agenda" period. See generally Section 1.1206(a) of this Commission's Rules. The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when this Commission (1) releases the text of a decision or Order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. See Section 1.1202(f) of this Commission's Rules. During the Sunshine Agenda period, no presentations, ex parte or otherwise, are permitted unless specifically requested by this Commission or Commission staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. See Section 1.1203 of this Commission's Rules.

520. In general, an ex parte presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding; or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. See Section 1.1202(b) of this Commission's Rules. Any person who submits a written ex parte presentation must provide on the same day it is submitted a copy of that presentation to this Commission's Acting Secretary for inclusion in the public record. Any person who makes an oral ex parte presentation that presents data or arguments not already reflected in the person's previously-filed written comments, memoranda, or filings in this proceeding must provide on the day of the oral presentation a written memorandum to the Acting Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and must state on its face that the Acting Secretary has been served, and must also state by docket number the proceeding to which it relates. See Section 1.1206 of this Commission's Rules.

521. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

X. ORDERING CLAUSES

522. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201-205, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 303(r), 403, and Section 553 of Title 5, United States Code, NOTICE IS HEREBY GIVEN of proposed amendments to Part 61, Part 69, and Sections 1.773, 61.32, 61.33, 61.38, 61.39, 61.58, 65.1, 65.200, 65.701, 65.703, 69.1, 69.3, 69.111, 69.113, 69.205, and 69.206 of this Commission's Rules, 47 C.F.R. Part 61, Part 69, §§ 1.773, 61.32, 61.33, 61.38, 61.39, 61.58, 65.1, 65.200, 65.701, 65.703, 69.1, 69.3, 69.111, 69.113, 69.205, 69.206, in accordance with the proposals, discussion, and statement of issues in this Further Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

523. We hereby give notice that in reaching our decisions in this proceeding we will not necessarily be limited to comments, reply comments, and responses that may be filed, and that we may utilize other information, analyses, and reports, provided that in each such case a copy of the material relied upon will be associated with the record in this proceeding.

524. IT IS FURTHER ORDERED that, in accordance the provisions of Section 1.419(b) of this Commission's Rules, 47 C.F.R. § 1.419(b), an original and five copies of all comments, replies, pleadings, briefs, and the other documents filed in the proceeding SHALL BE FURNISHED to this Commission. In addition, parties should file ten copies of any such pleadings with the Price Cap Task Force, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. Members of the public who wish to express their views by participating informally may do so by submitting one or more copies of their comments without regard to form (so long as the docket number is clearly stated in the heading). Copies of all filings will be available for public inspection during regular business hours in this Commission's Docket Reference Room (Room 239) at our headquarters at 1919 M Street, N.W., Washington, D.C.

525. IT IS FURTHER ORDERED that the motion to accept late-filed comments submitted by the Computer and Communications Industry Association IS GRANTED.

526. IT IS FURTHER ORDERED that the motion to accept late-filed comments submitted by the Oklahoma Corporation Commission IS GRANTED.

527. IT IS FURTHER ORDERED that the motion to accept late-filed reply comments submitted by the United States Department of Justice IS GRANTED.

528. IT IS FURTHER ORDERED that the late-filed pleadings submitted by the Arkansas Public Service Commission, the Communications

Satellite Corporation, the Contel Corporation, the District of Columbia Office of the People's Counsel, the Indiana Office of Utility Consumer Counselor, the Kentucky Public Service Commission, the Michigan Public Service Commission, the New Hampshire Public Utilities Commission, the Office of Telecommunications, UK, Rollins, Inc., and the State Commissioners on the CC Docket No. 80-286 Joint Board ARE ACCEPTED and made part of the record in this proceeding.

529. IT IS FURTHER ORDERED that the motion filed by Southwestern Bell Telephone Company on February 17, 1988, to strike certain comments filed on February 10, 1988, with respect to certain draft rule revisions filed on January 27, 1988, IS DISMISSED.

530. IT IS FURTHER ORDERED that the waiver of Section 1.49(c) of this Commission's Rules, 47 C.F.R. § 1.49(c), requested by the Ad Hoc Telecommunications Users Committee in connection with its filing of proposed rules on January 27, 1988, IS GRANTED.

531. IT IS FURTHER ORDERED that comments on this Further Notice of Proposed Rulemaking SHALL BE DUE not later than July 26, 1988, and that reply comments SHALL BE DUE not later than August 26, 1988.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX A

1. Comments (Filed October 19, 1987)
(cited as "Comments")

ADAPSO
Ad Hoc Telecommunications Users Committee (Ad Hoc)
Alabama Public Service Commission (Alabama PSC)
ALC Communications Corporation (ALC)
Alternative Carrier Telecommunications Association (ACTA)
American Association of Retired Persons (AARP)
American Petroleum Institute (API)
American Telephone and Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Arizona Corporation Commission (Arizona)
Arkansas Public Service Commission (Arkansas PSC)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
British Telecommunications plc (British Telecom)
Cable and Wireless Communications, Inc. (Cable & Wireless)
People of the State of California and the Public Utilities Commission of the State of California (California PUC)
Capital Cities/ABC, Inc., CBS, Inc., and National Broadcasting Company, Inc. (Networks)
Central Telephone Company (Centel)
Cincinnati Bell Telephone Company (CBT)
Citizens of Florida (Citizens)
Clark Telecommunications, Inc. (Clark)
Colorado Public Utilities Commission (Colorado PUC)
Committee of Corporate Telecommunications Users (CCTU)
Communications Satellite Corporation (Comsat)
Competitive Telecommunications Association (Comptel)
Computer and Communications Industry Association (CCIA)
Consumer Federation of America (CFA)
Contel Corporation (Contel)
CP National Corporation (CP National)
Delta Air Lines, Inc. (Delta)
Electronic Data Systems Corporation (EDS)
Enhanced Services Providers Association (ESPA)
Florida Public Service Commission (Florida PSC)
General Services Administration (GSA)
GTE Telephone Companies (GTOC)
State of Hawaii (Hawaii)
Illinois Commerce Commission (Illinois)
Indiana Office of Utility Consumer Counselor (Indiana UCC)
Independent Data Communications Manufacturers Association (IDCMA)

1. Comments (filed October 19, 1987) (continued)

International Brotherhood of Electrical Workers (IBEW)
International Business Machines Corporation (IBM)
International Communications Association (ICA)
Iowa State Utilities Board (Iowa)
Kentucky Public Service Commission (Kentucky PSC)
Local Area Telecommunications, Inc. (Locate)
Maryland People's Counsel (Maryland PC)
MCI Telecommunications Corporation (MCI)
Michigan Public Service Commission (Michigan PSC)
Staff of the Public Service Commission of the State of Missouri (Missouri PSC)
Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West) (as corrected by Erratum filed October 26, 1987)
National Association of State Utility Consumer Advocates (NASUCA)
National Exchange Carrier Association, Inc. (NECA)
National Telecommunications Network (NTN)
National Telecommunications and Information Administration (NTIA)
National Telephone Cooperative Association (NTCA)
New Hampshire Public Utilities Commission (New Hampshire PUC)
New York City Energy and Telecommunications Office (NY EnerTel)
New York State Department of Public Service (New York DPS)
New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
Office of Telecommunications, UK (OfTel)
Oklahoma Corporation Commission (Oklahoma)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell and Nevada Bell (Pactel)
Rochester Telephone Corporation (Rochester)
Rollins, Inc. (Rollins)
South Carolina Department of Consumer Affairs (SC DCA)
South Carolina Public Service Commission (SC PSC)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWB)
Taconic Telephone Corp., Merrimack County Telephone Company, Ronan Telephone Company, Telephone Electronics Corporation, Fort Bend Telephone Company, Elkhart Telephone Company, and Lewis River Telephone Company (Taconic)
Tele-Communications Association (TCA)
Teltec Saving Communications Company (Teltec)
United Airlines
United States Telephone Association (USTA)
United States Transmission Systems, Inc. (USTS)

1. Comments (filed October 19, 1987) (continued)

United Telecommunications, Inc. (United)
US Sprint Communications Company (US Sprint)
Utilities Telecommunications Council (UTC)
Public Service Commission of West Virginia (West Virginia)
Western Union Telegraph Company (Western Union)
Virginia State Corporation Commission (Virginia)

2. Reply Comments (Filed December 14, 1987)
(cited as "Reply")

ADAPSO
Ad Hoc
Aeronautical Radio, Inc.
Alarm Industry FCC Advisory Committee (Alarm Industry)
ALC
American Newspaper Publishers Association (ANPA)
Ameritech (as corrected by Erratum filed December 8, 1987)
AT&T
Bell Atlantic
BellSouth
British Telecom
Cable & Wireless
CBT
CCIA
CCTU
Centel
CFA
Citizens
Comptel
Comsat
Contel
District of Columbia Office of the People's Counsel (DC OPC)
District of Columbia Public Service Commission (DC PSC)
General Electric Communications and Services (GECS)
GTOC
Hawaii
IBM
ICA
IDCMA
Maryland PC
McCaw Communications Companies, Inc. (McCaw)
MCI
Multinational Business Services, Inc. (MBS)
NASUCA
National Association of Regulatory Utility Commissioners (NARUC)
NECA
Networks
NTCA
NTIA
NYN
NYNEX
Ohio Office of the Consumers' Counsel (Ohio OCC)

2. Reply Comments (Filed December 14, 1987) (continued)

OPASTCO
Pactel
Pennsylvania Public Utility Commission (Pennsylvania)
Puerto Rico Telephone Company (PRTC)
Rochester
State Commissioners on CC Docket No. 80-286 Joint Board (Joint Board)
SWB
Taconic
Telocator Network of America (Telocator)
United
United States Department of Justice (DOJ)
US Sprint
USTA
USTS
US West
UTC
Virginia
Western Union

3. Draft Rule Revisions (Filed January 27, 1988)
(cited as "Rules Submission")

Ad Hoc
ALC
API
AT&T
Ameritech
Bell Atlantic
BellSouth
Cable & Wireless
GTOC
MCI
NECA
NYNEX
Pactel
SWB
US Sprint
USTA
US West

4. Comments on Draft Rule Revisions (Filed February 10, 1988)
(cited as "Rules Comments")

Ad Hoc
ALC
AT&T
Ameritech
BellSouth
Centel
CBT
Comptel
Hawaii
IDCMA
Maryland PC
MCI
NTCA
Networks
OPASTCO
PRTC

5. Replies to Comments on Draft Rule Revisions (Filed February 17, 1988)
(cited as "Rules Reply")

Ad Hoc
Ameritech
Bell Atlantic
BellSouth
GTOC
Maryland PC
McCaw
MCI
NYNEX
Pactel
PRTC
TCA
Telocator
USTA
US West

APPENDIX B

Summary of Commission Price Cap Proposal

I. IN GENERAL

The price cap proposal adopted by this Commission for regulating dominant carriers[1] is designed to replicate better than traditional rate-of-return regulation the incentives to efficiency that characterize a competitive market. The essential premise underlying the proposal is that by limiting the rates carriers may charge, rather than their rates of return, price caps will drive carriers to avoid unnecessary costs, invest in efficiency enhancing technology, and employ innovative service approaches in order to earn the greatest levels of return within the applicable rate limitations. At the same time, the plan guarantees that ratepayers obtain their share of expected productivity gains first, with carriers retaining any additional profits they may generate. Thus, both ratepayers and carriers will be better off than under traditional regulation.

The price cap plan will operate in concert with existing regulation and will be available on an elective basis to AT&T and to any LECs not electing to participate in either the common line or traffic sensitive pools administered by the National Exchange Carrier Association (NECA). At the end of the third year, this Commission will conduct a comprehensive performance review of the plan's operation.

II. SCOPE OF PRICE CAP REGULATION

A. Services Covered

The proposed regulatory model will regulate rates through a system of aggregate caps on specified service groups ("baskets"), and rate element-specific bands. It will cap all of AT&T's existing services, except the carrier's Tariff 5 Special Construction services, Tariff 12 services (including Special Routing Arrangement Service, Defense Commercial Telecommunications Network, Digital Tandem Switched Network and Arrangements, and Virtual Telecommunications Network Service), and services subject to separate, "below-the-line" accounting requirements (such as

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1 The proposed price cap plan would be applicable to American Telephone and Telegraph Company (AT&T) and the local exchange carriers (LECs). This Commission also tentatively concludes that extending the proposed price cap plan to Alascom and Comsat is not warranted at this time.

Accunet Packet Switching and Skynet KU). For participating LECs, the proposal will cap all existing services, except the common line element, and services contained in special construction and individual case basis (ICB) tariffs. The excepted service categories will remain subject to conventional 45-day tariff notice and existing tariff review requirements, and revenues generated from such services will be segregated from revenues of capped services for carrier performance review purposes. The Further Notice tentatively proposes to include the carrier common line (CCL) element in price cap regulation as part of the annual access tariff filing that takes effect in 1990; we do not propose to include this rate element in price cap regulation from the outset, because at the time price caps begin, on April 1, 1989, there will be no tested depooled CCL rates.

For AT&T, the proposal contemplates creation of two baskets -- one for private line services, and one for services, such as MTS, international MTS, and WATS, that use the switched network. Similarly, capped LEC services will be separated into a switched access basket, and another basket for all other services, consisting primarily of special access services, but also including LEC interexchange services.

B. New and Restructured Services

Our proposal provides that new services, which by definition include only those services offering users an additional measure of choice, will initially be offered outside of the price cap structure. Subsequently, such services will be brought under caps based upon the historical price and revenue figures that were established during the period outside the cap. On the other hand, restructured services, defined as those involving the modification of a method of charging or provisioning for an existing service, or the introduction of a new method of charging or provisioning, will remain subject to price cap regulation from the outset. As is the case under existing procedures, the degree of rate structure flexibility accorded AT&T and the LECs under price cap regulation differs. The LECs must maintain the rate structure established in Part 69 of this Commission's Rules, or petition for a waiver of the prescribed rate structure.

III. TARIFF FILING PROCEDURES

A. In General

The plan establishes new tariff filing and review procedures for participating carriers. For each basket of services, the plan proposes a ceiling on the aggregate revenue-weighted rates that may be charged if a carrier is to receive streamlined filing and review treatment for its tariff. Under this approach, carriers are given flexibility in setting rate levels for individual services within the baskets, although, through rate element-specific bands, we propose to restrain the maximum annual change

in the rates for each service to protect ratepayers and to discourage potentially anticompetitive practices. As described below, the applicable cap for each basket of services will be expressed through the mechanism of a price cap index (PCI), which measures changes in inflation, productivity, and certain specific costs beyond a carrier's control. Compliance with the cap will be measured through the mechanism of an actual price index (API), an index of aggregate revenue-weighted proposed rates within a basket, and a base price index (BPI), an index of that basket's aggregate revenue-weighted average rates during the "base year" -- the 12-month period ending six months prior to the effective date of each annual price cap tariff.

Within the aggregate ceilings established for each basket of services, the plan provides for bands (described in more detail in Section IV.B, infra) that limit the degree to which individual rate element prices may fluctuate during any given year while retaining streamlined tariff filing and review treatment. Rate decreases below a band's lower boundary may be permitted upon a demonstration that the proposed rate covers the cost of providing the service. However, as explained below, the carrier will receive credit for only the first 5 percent of the rate decrease in calculating compliance with the basket's aggregate rate ceiling.

B. Annual Filings

The proposal provides that initial price cap tariffs must be filed by the LECs on December 30, 1988, with an effective date of April 1, 1989. AT&T's initial price cap tariff must be filed on February 16, 1989, with an April 1 effective date. Thereafter, annual price cap tariffs will be filed with a July 1 effective date, and LECs must continue to file on 90 days' notice, while AT&T would continue to file on 45 days' notice. The notice period for AT&T reflects the fact that (as under current practice) the AT&T filing must incorporate proposed access rate changes filed by the LECs. As part of the annual filing, carriers must demonstrate that they have made appropriate adjustments to their PCIs and BPIs according to the required procedures. In order to receive streamlined treatment and to avoid likely tariff suspension, they must also demonstrate that their APIs do not exceed applicable PCIs. Carriers electing price cap regulation are not otherwise required to comply with traditional cost support filing requirements.

C. Streamlined Review

The plan provides that once the annual PCI adjustments have become effective, rate level changes within applicable cap and band limits will be subject to streamlined tariff filing and review treatment. Such tariffs may be filed on 14 days' notice, shall be prima facie lawful, and need be accompanied only by a showing that the proposed prices are at or below the PCI ceiling and are within the price band. Such rates generally will not be subject to suspension, unless this Commission determines on our own or upon challenge by a petitioner (1) that there is a high probability that

the tariff would be found unlawful under Section 201 or Section 202 of the Act (or any other provision of the Act or any other statutory or legal requirement) after investigation; (2) that suspension would not substantially harm other parties; (3) that irreparable injury would be suffered if suspension does not issue; and (4) that the suspension would not otherwise harm the public interest. Current complaint procedures under Section 208 of the Communications Act would not be altered by the price cap plan. And, upon suspension or investigation of a tariff, current procedures under Section 204 of the Act would remain unchanged.

D. Above-Cap or Out-of-Band Rate Filings

Tariffs containing above-cap or above-band rates must be filed on 90 days' notice and will generally be suspended and subject to full regulatory scrutiny under the price cap proposal. Tariffs proposing above-cap rates must be accompanied by cost support data covering each rate in the basket for the entire period under price caps, and a detailed explanation of the carrier's cost allocation methodology. The carrier must demonstrate that the proposed above-cap rates are just and reasonable by showing, for example, that such rates are essential to attract capital sufficient to conduct its business. In the case of above-band filings, carriers must demonstrate "substantial cause" for the rate increase. Since applicable cap and band limits reflect this Commission's tentative view of the dividing line between reasonable and unreasonable rates, above-cap or above-band filings presumptively will be subject to suspension and investigation. Tariffs containing below-band rates must be filed on 45 days' notice and must be accompanied by a showing that the rates are sufficient to cover the cost of providing the service.

E. Review of New and Restructured Services

New service offerings outside the cap must be filed on 45 days' notice and must be accompanied by a demonstration that they meet the "net revenue" test. Thus, the carrier must establish that the service, and each unbundled element thereof, will generate a net revenue increase -- measured against revenues generated from services in the same basket, and calculated based on present value -- within a 24-month period after an annual price cap tariff including the new service takes effect, or within 36 months from the date the new service becomes effective, whichever occurs first. Capped services that have been restructured shall remain under price cap regulation. However, rate restructuring will be subject to 45 days' notice and, in order to avoid likely suspension, must be accompanied by a showing that the proposed restructuring will not drive the affected API above its respective PCI. Minor text changes will continue to be subject to existing tariff review procedures.

IV. OPERATION OF PRICE CAP ADJUSTMENT MECHANISMS

As noted above, the plan contemplates creation of a price cap index, a base price index, and an actual price index for each basket of services. The PCI is an index of change in the cost of factors of production (i.e., inflation), carrier productivity, and certain carrier-specific costs that are beyond the carrier's control. The PCI is adjusted annually to account for changes in its component cost factors, and it acts as a ceiling above which the index of proposed prices within the basket, the API, cannot go without full regulatory scrutiny. Similarly, the BPI is adjusted annually to reflect the basket's aggregate revenue-weighted average rates during the base year, and is used as a benchmark against which proposed rates are measured in calculating the API.

A. Basic Formulas and Calculations

1. PCI Adjustments

Broadly speaking, the PCI is adjusted according to the following formula:

$$\text{Proportional change to the price cap index} = w(I - X)/100 + \Delta Y/R + \Delta Z/R$$

where I = the percentage change in the GNP-PI,[2]

X = productivity factor of 3.0%,

w = the fraction of base period gross revenues represented by non-access costs net of ΔZ (as defined below), divided by base period gross revenues,

ΔY = the dollar magnitude of any change in access charges for the upcoming tariff year, evaluated at base period demand,

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2 The GNP Price Index (GNP-PI) is employed instead of the better known Consumer Price Index or Producer Price Index, because it exhibits less volatility over time, and is more broadly based to better reflect carriers' actual cost experience. The GNP-PI is produced by the U.S. Department of Commerce and can be found in their Survey of Current Business at Table 7.1 or in the Economic Report of the President at Table B-4.

ΔZ = the dollar magnitude of any other exogenous cost changes, and

R = base period gross revenues.

The productivity factor "X" reflects the conclusion that the telecommunications industry's productivity gains have in the recent past exceeded those of the economy as a whole by approximately 2.5 percent annually. In order to share the benefits of price caps with ratepayers and to induce carriers to achieve greater productivity gains, the Further Notice assigns "X" a value of 3 percent. Carrier-specific exogenous cost changes which are represented by the term " Z" include those caused by (1) changes in tax laws; (2) the completion of the amortization of depreciation reserve deficiencies and inside wiring costs; (3) changes in the Uniform System of Accounts; and (4) changes in the Separations Manual.[3]

The actual mechanics of adjusting the PCI are slightly more complex than the formula described above. The initial base year PCI for each basket will be assigned a value of 100. However, the PCI must be adjusted at the time of the initial price cap filing, and at every annual filing thereafter, to reflect changes in costs. Adjustments to the PCI must be made pursuant to the following formula:

$$PCI(new) = PCI(base)[1.0 + w(I - X)/100 + \Delta Y/R + \Delta Z/R].$$

2. API and BPI Adjustments

Under the plan, the initial BPI for each basket of services is established using the revenue-weighted average rates of the basket's services in effect during the first base year (the 12-month period ending September 30, 1988). Like the initial base year PCIs, the initial BPIs will be assigned a value of 100. Beginning with the initial price cap tariff filing, the carrier will propose prices for the services in each basket. For each such service, the ratio of its proposed new price to its average price in the base year is calculated. Thus, for each service, the ratio is calculated as the proposed price for the coming year, denoted as p2, divided by its average price during the base year, p1. This term (p2/p1) will be multiplied by the corresponding weight that should be attached to that price. The sum of all such terms (representing weights multiplied by price

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3 The Further Notice seeks additional comment on whether cost changes caused by changes in international accounting rates should trigger adjustments to the PCI.

ratios) is multiplied by the BPI value to determine the API value. The weights applied to the price ratios described above are the ratios of revenues generated by each corresponding service to total basket revenues during the base year. Denoting these weights as "v" and the services by the index "i," the API is derived according to the following formula:

$$API = BPI\ [\sum_i v_i\ (p2/p1)_i]$$

The BPIs are adjusted in each annual price cap filing following the inaugural filing to reflect the change in revenue-weighted average rates in a basket from one base period to the next. Each adjustment is made pursuant to the following formula:

$$BPI = BPI(\text{previous year})[\sum_i v_i\ (p2/p1)_i]$$

where

BPI(previous year) = the BPI from the base year preceding the most recently completed base year,

p2 = the average price (revenue divided by quantity) of a ratable element during the most recently completed base year,

p1 = the average price (revenue divided by quantity) of a ratable element during the base year preceding the most recently completed base year,

v = the ratio of revenues generated by a ratable element during the base year preceding the most recently completed base year to the basket's total revenues during that base year, and

i = the ratable elements in the basket.

B. Reductions Below Price Floors

Excepted from the basic API adjustment formula described above are price reductions beneath the plan's lower band boundaries. Rate bands for a rate element define a zone within five percentage points above or below an amount equal to the rate that prevailed on the last day of the base year, increased or decreased (as appropriate) by the percentage change in the current PCI compared to the previous PCI. The portion of a proposed rate

reduction that falls below the band will be disregarded for the purpose of calculating the API.

C. Calculations for New Services

The plan provides that new services introduced during any base year are to be brought into the API, and consequently made subject to the pricing limitations imposed by the PCI and bands, at the first annual price cap tariff filing following the close of the base year in which the new service was introduced. Since BPI calculations require a comparison of rates in two completed base years, new services cannot be brought into the BPI calculations until the second annual tariff filing following the close of the base year in which they are introduced.

To introduce a new service into price cap regulation, the revenue weights and average rates used in calculating the API must be calculated with the new service included in the price cap basket for the base year that is used as a basis for the upcoming annual filing. The percentage change between the base year average prices (including that of the new service), at these revenue weights, and the proposed prices (including that of the new service), at these same revenue weights, is multiplied by the value of the BPI to produce the appropriate API value. This API value will then be compared to the PCI for compliance with price cap requirements.

D. Calculations for Restructured Services

The plan contemplates that restructured services must remain subject to the cap and band limitations applicable to the basket(s) that contained those services prior to restructuring. Thus, unlike the introduction of new services (which are brought into the various index calculations after an initial period outside price caps), restructuring requires an API calculation that measures the change that would result in the total cost of purchasing the bundle of services for which restructuring is proposed. This calculation may require use of carrier data and estimation techniques to assign customers of the original service to those services (including the restructured service) that will remain or become available in the basket.

V. EFFECT ON CURRENT COMMISSION RULES

Price cap regulation will result in little change to many of this Commission's applicable current rules and policies. This Commission's current policy favoring geographic toll rate averaging will remain intact. The plan does not disturb current quality of service monitoring procedures, including requirements that AT&T and the Bell Operating Companies (BOCs) file semi-annual quality of service reports, and the routine scrutiny given to all dominant carriers pursuant to the facilities authorization process conducted under Section 214 of the Communications Act. The plan also preserves the Separations Manual, the Uniform System of Accounts, and the

joint cost procedures codified in Part 32 and Part 64 of this Commission's Rules. In addition, price cap regulation leaves undisturbed current market rules designed to foster competition and prevent discrimination. These rules include open entry, equal access, resale and shared use, interconnection, unbundling of tariff services, non-structural safeguards for joint provision of regulated and nonregulated activities, and the Open Network Architecture and Comparably Efficient Interconnection protections against discrimination.

VI. REVIEW

In addition to ongoing monitoring, at the end of the third year under price cap regulation this Commission will commence a comprehensive examination of the price cap plan. This review will consider all available measures of market and carrier performance, including the level of actual prices, achieved rates of return, quality of service, and technological progressiveness. While the plan proposes that no retroactive payments will be exacted from carriers for high profit levels achieved under price caps, the review may lead to adjustments to the overall level of price caps in future years, if such changes are found to be appropriate.

APPENDIX C

Analysis of AT&T Productivity (1984-88)

The price cap plan proposed in this Notice is based on the flow-through of certain exogenous cost changes incurred by the carrier together with the application of inflation and productivity factors to those costs the carrier directly controls. This framework permits inferences of carrier productivity from past price changes. This Appendix describes the general methodology for calculating productivity and the analysis performed by the Common Carrier Bureau for AT&T in the post-divestiture period.

Methodology.

The methodology for this analysis is best described through a simplified example in which there are no exogenous costs and no inflation, but only direct costs of production controlled by the carrier and subject to rate-of-return regulation. In this case, total carrier revenue equals total carrier cost, or equivalently, price equals unit cost. Hence, any change in the price a carrier charges between two periods (e.g., a year) is due to a cost change that is incurred by the carrier, recognized by the regulator, and reflected in price so as to maintain normal profits. If the carrier experiences a productivity gain of X percent between the periods, effective rate-of-return regulation will lead to a price decrease of exactly X percent. Alternatively stated, if price is observed to decrease by X percent in this simple example, unit cost may be presumed to have declined by that percentage. In this manner, examination of price changes over time provides direct insight into underlying cost changes.

Two factors add both realism and some complexity to this example. First, general inflationary factors over time also give rise to regulatory approval for price increases. Those price increases that exactly match overall inflation do not represent productivity changes, but simply reflect the changed value of money. Therefore, the real cost change will be the price change net of an appropriate index of inflation. Secondly, in our price cap plan changes in certain exogenous costs are not indexed, but rather are flowed through directly to prices. To this extent, the change in exogenous cost should be netted from any price change before calculating the inflation and productivity factors.

The general methodology therefore proceeds first by accounting for the changes in carrier revenues associated with Commission-approved price changes.[1] These represent the nominal (current-dollar) price changes due

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1 Stating these changes in terms of total revenues and total costs is merely a matter of convenience, since by definition the total figures differ

to all the factors noted above. From this total increase over the period must be netted all changes in exogenous costs, leaving the change in direct costs. This change in direct costs can then be converted to a percent of total cost (or equivalently under rate-of-return, total revenue), and this percentage must be equal to inflation minus productivity.

AT&T's Productivity.

Our analysis of AT&T's productivity begins with divestiture in January, 1984, and extends to January, 1988. The first post-divestiture tariff went into effect in May, 1984, and Commission actions since that time include a number of significant changes in access charges (an exogenous expense) and in allowed prices. In addition, certain other exogenous expenses have undergone change. The following represents a chronology of these events, which are summarized in the Table attached to this Appendix.

Event 1--May 24, 1984: The first annual access filing reduces AT&T's expenses by $1,400 million. AT&T lowers its prices (6.1 percent on MTS and WATS) so as to pass all $1,400 million through to consumers.[2]

Event 2--January 15, 1985: Access charges to AT&T are increased by $274 million. AT&T does not change its prices.[3]

Event 3--April 26, 1985: AT&T increases its prices so as to yield a revenue increase of $154 million.[4]

Event 4--June 1, 1985: Access charges are decreased to AT&T by $1,157 million. AT&T lowers its prices so as to pass all $1,157 million through.[5]

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from the unit values -- price or unit cost -- by the same quantity term.

2 See Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Mem. Op. & Order, FCC No. 84-201, released May 15, 1984, App. A, Table 9.

3 See National Exchange Carrier Association, Inc., Revisions to Tariff F.C.C. No. 1, Tr. No. 23, Order, Mimeo No. 1990, released Jan. 17, 1985.

4 See AT&T Communication, Revisions to Tariff F.C.C. No. 1, Tr. No. 357; see also AT&T Communications Revisions to Tariff F.C.C. No. 1, Tr. No. 357, Mem. Op. & Order, Mimeo No. 36207, released Oct. 10, 1985.

5 See AT&T Communications, Revisions to Tariff F.C.C. Nos. 1 and 2, Tr. No. 358; see also AT&T Communications, Revisions to Tariff F.C.C. Nos. 1 and 2, Tr. No. 358, Order, Mimeo No. 6186, released Aug. 7, 1985.

Event 5--October 1, 1985: Access charges to AT&T are decreased by $525 million. AT&T does not change its prices.[6]

Event 6--January 1, 1986: AT&T cuts its prices so as to reduce revenues by $135 million.[7]

Event 7--June 1, 1986: Access charges are reduced to AT&T by $2,000 million. AT&T cuts its prices and passes through all $2,000 million.[8]

Event 8--January 1, 1987: Access charges to AT&T are cut by $1,865 million. AT&T passes through the entirety of these cuts.[9]

Event 9--July 1, 1987: Access charges to AT&T are reduced by $593 million. AT&T lowers its prices so as to pass through all the cost decrease.[10]

Event 10--January 1, 1988: Access charges are decreased to AT&T by $772 million. The Tax Simplification Act of 1987 results in a reduction of AT&T's tax liability in the amount of $135 million. The change to Statement of Financial Accounting Standards (SFAS) - 87 pension accounting results in a cost reduction to AT&T of $209 million.[11] AT&T reduces its rates

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6 See Annual 1985 Access Tariff Filings, Order, Mimeo No. 7401, released Sept. 30, 1985.

7 See AT&T Communications, Revisions to Tariff F.C.C. No. 1, Tr. No. 514; see also AT&T Communications, Revisions to Tariff F.C.C. No. 1, Tr. 514, Order, Mimeo No. 4396, released May 9, 1986.

8 Midyear 1986 Access Tariff Filings, National Exchange Carrier Association, E.C.A. Tariff F.C.C. No. 1, Tr. Nos. 122 and 134, CC Docket No. 86-181, Order, Mimeo No. 4867, released May 30, 1986.

9 See Annual 1987 Access Tariff Filings, Mem. Op. & Order, 2 FCC Rcd 866 (1986).

10 See AT&T Communications, Revisions to Tariff F.C.C. Nos. 1 and 2, Tr. No. 915, May 15, 1987.

11 Use of Generally Accepted Accounting Principles on Part 32 of the Commission's Rules, RM-5835, Mem. Op. & Order, 2 FCC Rcd 6675 (1987).

sufficiently to pass through the access charge reduction of $772 million.[12]

From the Table it is therefore apparent that during this period, AT&T had a net reduction in its access charges and other exogenous costs of $8,382 million. Under our price cap plan this total would be entirely flowed through to consumers. AT&T's actual price reductions during this period, as shown in the Table, amounted to $7,768 million. These price reductions were less than changes in its exogenous costs in the amount of $614 million. This last figure represents the change in nominal prices (or revenues) that AT&T put into effect over the four-year period from January, 1984 to January, 1988. This averages to a $153.5 million per year increase.

Over that interval, AT&T's direct costs, measured as its gross service revenues minus carrier's carrier expense, averaged $17,144 million per year.[13] We therefore conclude that as a percent of its direct costs, AT&T's prices rose by 0.90 percent per year on average, calculated as $153.5 million divided by $17,144 million. The final step of the calculation is a determination of the magnitude of increase of the overall price level over the same period. Our proposed price index is the GNP Price Index based on the period ending six months prior to the time that the new tariff goes into effect. Therefore, for the period in question, application of our plan would be based on the GNP-PI from the second quarter of 1983 to the second quarter of 1987. Over this period, the GNP-PI rose from 103.6 to 118.6, which is an expanded annual rate of 3.38 percent.[14] But since AT&T's prices rose at an annual rate of only .90 percent, we conclude that its added productivity accounts for the difference, namely, 2.48 percent per year.

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12 See AT&T Communications, Revisions to Tariff F.C.C. Nos. 1, 2, 11, 13, and 14, Tr. Nos. 1063 and 1064, CC Docket No. 87-611, Order, Mimeo No. 1128, released Dec. 30, 1987.

13 Computed from various editions of AT&T Communications Interstate Monthly Report No. 1.

14 See Survey of Current Business (various issues).

TABLE

AT&T Cost and Revenue Changes

Date	Cost Change ($M)	Revenue Change ($M)	Net Change ($M)
5/25/84	- 1,400	- 1,400	0
1/15/85	274	-	- 274
4/26/85	-	154	154
6/1/85	- 1,157	- 1,157	0
10/1/85	- 525	-	525
1/1/86	-	- 135	- 135
6/1/86	- 2000	- 2000	0
1/1/87	- 1,865	- 1,865	0
7/1/87	- 593	- 593	0
1/1/88	- 772	- 772	0
	- 135		135
	- 209		209
TOTAL	8382	7768	614

APPENDIX D

CALCULATING THE PRICE CAP INDICES: SOME EXAMPLES

Example 1: Calculating the Actual Price Index

Under price cap regulation, the FCC sets a maximum limit on a regulated carrier's prices. The index that measures the overall price level of a service group, or "basket," is referred to as the actual price index (API). The index that gives the maximum allowed level of overall prices is denoted as the price cap index (PCI). In this first example, it is assumed that the PCI remains constant throughout the period considered. We will also assume that proposed prices fall within the bands that limit the annual movement of individual rate elements.

Our example first explains the process for initializing the API and PCI. Then it illustrates the procedure for checking whether the overall price level (API) of services within a basket is below the maximum allowed level (PCI). This is done both for the first annual price cap tariff filing and a proposed mid-year rate change. Throughout the following discussion, we will refer to table 1 that appears at the end of the example.

Initializing the price cap indices

In this example it is assumed that the first set of tariffs filed under the price cap rules will go into effect on April 1, 1989. Under the proposal, this would imply that the prices prevailing during the period October 1987 through September 1988 will be used to initiate the calculation of the price indices. This period will be referred to as the base period.

We initialize the indices by setting both the base price index (BPI) and the price cap index at 100 for the base period. The BPI measures the price level prevailing during the base period and can be thought of as the API for the base period. The choice of 100 as the initial value is a common convention for initiating any index. Setting both indices at the same level implies that the prices prevailing during the base period exactly meet the constraint that the API be less than or equal to the PCI.

Table 1 illustrates the working of price-caps for two services. The base period data needed to initiate the plan are shown on the first six lines. Lines 1 and 2 show the initial values of the price cap index and actual price index respectively. In calculating the API for the beginning of price cap regulation, we will need a measure of the relative importance of the services sold during the base period and a measure of the prices during the base period. The former is measured by the share of total revenue generated by each service (line 5) and is termed "expenditure

weights." The latter is measured by the average price of each service during the base period (line 6).

The expenditure weight for service 1, .67 (column 1, line 5), is calculated by dividing the total revenue generated by service 1, $200 (column 1, line 3), by total revenue generated by all services, $300 (column 3, line 3). The expenditure weight for service 2, .33 (column 2, line 5), is calculated using the same method.

The average price for service 1, $2 (column 1, line 6), is found by dividing total revenue generated by service 1 during the base period, $200 (line 3), by the total quantity of service 1 during the period, 100 (line 4). The average price for service 2 is found in the same way.

Checking that the API does not exceed the PCI

Initial price cap filing. Before the tariffs proposed for April 1, 1989 can go into effect, the FCC must check that the overall price level of each basket, as measured by the API, does not exceed the maximum allowed level for that basket. That maximum level is measured by the PCI, which we have assumed to remain at 100 throughout the example.

The API for the proposed prices is found by multiplying the BPI from the base period by a multiplier that gives the the cost of buying the base period quantities at the proposed prices relative to the cost of buying the base period quantities at base period prices. The multiplier can equivalently be expressed as a weighted sum of the ratios of individual proposed prices to individual base period prices, where the weights are the base period expenditure weights for each service. Mathematically, the formula for calculating the API for a proposed tariff is given by

$$API(\text{proposed}) = BPI \left[\sum v_1^i \frac{p_2^i}{p_1^i} \right]$$

where BPI is the base period price index, v_1^i is the expenditure weight for each service during the base period, p_2^i is the proposed price of each service, and p_1^i is the average price of each service during the base period.

The first step in calculating the API for the proposed tariff is to compute the ratio of the proposed price for each service to the price of that service during the appropriate base period. For service 1, the ratio of the price to take effect April 1, 1989 ($1.95) to the average price of service 1 during the base period ($2.00) is .98 (line 9). Likewise, for service 2 the ratio of the price proposed to take effect January 1, 1989 ($2.05) to the average price of service 2 during the base period ($2.00) is 1.03 (line 9).

Next, one needs to calculate the weighted sum of these price ratios, where the weights are the expenditure weights during the base period. The weighted price ratios (line 10) are found by multiplying each base period expenditure weight (line 5) by the corresponding price ratio (line 9). For example, for service 1 multiplying the expenditure weight of .67 by the price ratio of .98 gives .65. Adding together the weighted price ratios (line 10) and multiplying the sum by the base period BPI, 100.00 (line 2), gives the new actual price index of 99.17 (line 11). Since this is less than the PCI of 100 (line 7), the proposed tariff meets the API requirement.

Mid-year rate level change. At some point during the first six months of the operation of price caps, the carrier proposes to raise the price of service 2 to $2.10 effective October 1, 1989 (line 12). We must determine whether the API calculated at the proposed prices exceeds the current level of the PCI, which we assume to be 100. The procedure is precisely the same as for checking the initial annual price cap tariff filing.

The first step in calculating the API associated with the proposed prices is to compute the ratio of the proposed price for each service to the price of that service during the base period. For service 1, the ratio of the price to take effect October 1, 1989 ($1.95) to the average price of service 1 during the base period ($2.00) remains at .98 (line 13). However, for service 2 the ratio of the price proposed to take effect July 1, 1989 ($2.10) to the average price of service 2 during the base period ($2.00) is now 1.05 (line 13).

Next, one needs to calculate the weighted sum of these price ratios, where the weights are the expenditure weights during the base period. The weighted price ratios (line 14) are found by multiplying each base period expenditure weight (line 5) by the corresponding price ratio (line 13). For example, for service 2 multiplying the expenditure weight of .33 by the price ratio of 1.05 gives .35. Adding together the weighted price ratios (line 14) and multiplying the sum by the BPI (100.00, line 2) gives the new actual price index of 100.00 (line 15). Since by assumption the PCI remains at 100, the proposed prices meet the requirement that the API not exceed the PCI.

A note on rounding errors in table 1

It should be noted that although results of arithmetical calculations are reported to two decimal places in the table, they are carried to more decimal places in the calculations. Thus for arithmetical operations based on the results of earlier calculations, one will not get exactly the same final results as reported here if one bases those calculations on the results of earlier calculations reported only to two decimal places.

TABLE 1

Base Period (October 1987 - September 1988)

Line		Service 1	Service 2	Total
1.	Price Cap Index			100.00
2.	Base Price Index			100.00
3.	Revenue	$200.00	$100.00	$300.00
4.	Quantity	100	50	
5.	Expenditure Wts	0.67	0.33	
6.	Average Price	$2.00	$2.00	

Plan Initiated April 1, 1989

April 1989 - September 1989

		Service 1	Service 2	Total
7.	Price Cap Index			100.00
8.	Price	$1.95	$2.05	
9.	P(April)/P(87-88)	0.98	1.03	
10.	Wtd. Price Ratio	0.65	0.34	
11.	Actual Price Index			99.17

October 1989 - March 1990

		Service 1	Service 2	Total
12.	Price	$1.95	$2.10	
13.	P(Oct.)/P(87-88)	0.98	1.05	
14.	Wtd. Price Ratio	0.65	0.35	
15.	Actual Price Index			100.00

Example 2: Calculating the Price Cap Index

The second example illustrates the calculation of a change in the price cap index (PCI). The PCI for a new period is found by multiplying the PCI from the base period by a multiplier that is an estimate of the cost of producing the base period quantities at the input prices prevailing during the new period relative to the cost of producing the base period quantities at the input prices during the base period. In constructing this ratio we use actual revenues during the base period as an estimate of base period production costs.

The change in a carrier's input prices (except for access charges paid by AT&T) is estimated by the change in an economy-wide price index (GNP-PI) adjusted for the approximately 2.5% difference between the historical trend in productivity in the telephone industry and in the economy as a whole. In addition to the 2.5% adjustment, an additional adjustment of .5% has been made to guarantee that consumers receive a share of the cost reductions anticipated from adopting price caps. In addition, the PCI is adjusted to reflect changes in the cost of access (for AT&T), and exogenous structural changes in laws and regulations that affect costs other than access. For example, in the case of a tax law change, one would calculate the tax liability at the base period inputs, outputs, and prices but under the new tax code, and compare the result with the actual tax liability during the base period.

In the text of the Further Notice we provide the following formula for determining the PCI:

$$PCI_{(new)} = PCI_{(base)}[1 + w(I - X)/100 + \Delta Y/R + \Delta Z/R]$$

where

R = base period total revenues;

Y = base period access costs (this applies only to AT&T);

ΔY = the change in base period access costs that would result from a proposed change in the price of access;

Z = R - Y, base period direct costs, i.e. non-access costs;

ΔZ = the change in base period direct costs as a result of exogenous structural changes such as changes in tax laws, and separations rules;

I = percent change in the GNP-PI price index;

X = 3 percent (2.5% historical trend in productivity plus .5%); and

$w = (Z + \Delta Z)/R.$

In this example we will also employ a mathematically equivalent formula for the PCI. It can be found by factoring out 1/R from the right side of the expression for the PCI, giving

$$PCI_{(new)} = PCI_{(base)}\left[\frac{R + (Z + \Delta Z)(I - X)/100 + \Delta Y + \Delta Z}{R}\right]$$

In this form, we can see that the numerator of the term multiplying the base PCI is the base period revenue adjusted for changes in cost that have occurred since the base period, while the denominator is the base period total revenue, which is a proxy for base period total cost.

Initializing the price cap index

Table 2 illustrates the calculation of the PCI for AT&T, using data that is consistent with that presented for the base period in example 1. As in the first example, we initialize the PCI at 100 (line 1). Line 2 gives the total revenues earned by the carrier during the base period ($300). Line 3 gives expenses paid for switched access ($120). Subtracting line 3 from line 2 gives direct costs ($180), shown on line 4. Line 5 gives the total quantity of switched access, 150. This will be needed in calculating the change in switched access costs at base period quantities but new access prices.

Calculating the PCI for the initial price cap filing

In example 1 we assumed that the PCI remained at 100 throughout the example. Here we will illustrate the effect on the PCI of changes in switched access, GNP-PI - X, and tax law. We will calculate the PCI for April 1, 1989, the start of the price cap regime.

We assume that the price per unit of switched access will be $.75 (line 8) on April 1, 1989 when the price cap plan is initiated. This is a $.05 reduction from the $.80 price prevailing during the base period (line 6). To determine the change in access costs we first calculate AT&T's switched access expense at the new price, but the base period quantity. Multiplying $.75 (line 8) by 150 (line 5) gives $112.50 (line 9). Comparing $112.50 to the $120 expense for switched access during the base period gives a -$7.50 (line 10) change in switched access expenses relative to the base period. We assume that changes in tax laws, e.g., a reduction in the corporate income tax rate, would result in $10.00 reduction in tax liability (line 11) during the base period had all inputs, outputs, and prices remained the same.

We now have all the data necessary to calculate the new price cap index. The remaining lines of table 2 go through that calculation twice -- first using the second formula presented for the PCI and then using the formula as provided in the text of the Further Notice.

The first step under method 1 is to adjust base period direct costs for the change in the tax law. Under the tax law prevailing on April 1, 1989, direct costs would be $10 less than than they were during the base period. Subtracting $10 (line 11) from base period direct costs of $180 (line 4) gives $170 (line 12). Thus $170 is the appropriate base to which we should apply the inflation/productivity adjustment (GNP-PI - X). Direct costs were assumed to increase by 1% (line 7), absent any exogenous structural changes. This is just GNP-PI - X, where we assumed that GNP-PI was 4% during the base period and X equals 3%. Taking 1% of $170 gives $1.70 (line 13), the increase in direct costs due to inflation net of productivity increases.

Line 14 gives the predicted change in total costs from inflation, productivity changes, changes in access prices, and changes in tax laws. It is -$15.80, the sum of lines 13, 10, and 11. Adding this to base period total revenues, which are a proxy for base total costs, gives $284.20, the predicted total costs for the period beginning April 1, 1989 (line 15). Dividing line 15 by line 2 gives the multiplier in the formula above, .9473 (line 16). Conceptually, it is the ratio of predicted costs to base total costs, where the latter is measured by base total revenues. Multiplying this ratio by the base period PCI, 100 (line 1) gives the new PCI of 94.73 (line 17).

Lines 18 through 22 show the calculation of the new PCI by the formula in the main text. Line 18 gives the weighting factor, w, which is equal to direct costs net of the reduction in tax liability (line 12), divided by base period revenues (line 2). The weighting factor gives the fraction of total costs that should be indexed by GNP-PI - X. Multiplying w by the inflation/productivity index ([line 7]/100) gives line 19. Line 20 is the change in access costs as a fraction of base period revenues (line 10/line 2). Line 21 is the change in base period direct costs due to the change in the tax code, divided by base period revenues (line 11/line 2). Finally, line 22 gives the new price index of 94.73. It is found by multiplying the base period PCI (line 1) by one plus the sum of lines 19, 20, and 21.

Checking that the API does not exceed the PCI

The prices proposed in example 1 for the initial price cap tariff filing generated a API of 99.17, so they would not be permissible if the PCI had changed in they way described in this example. The carrier would need to propose a lower price level, for example, $1.85 for service 1 and $1.95 for service 2. Using the procedure described in example 1, it can be shown that these prices would result in an API of 94.17, which is below the PCI.

TABLE 2

Base Period (October 1987 - September 1988)

Line		
1.	Price Cap Index	100
2.	Total Revenues (R) (Proxy for base total costs)	$300.00
3.	Access Costs (Y)	$120.00
4.	Direct Costs (Z) (line 2-line 3)	$180.00
5.	Switched Access Minutes	150
6.	Price of Access	$0.80
7.	GNP-PI-X (I-X)	1%

April 1, 1989

8.	Price of Access	$0.75
9.	Access Cost (at new P and base Q) (line 8×line 5)	$112.50
10.	Change in Access Costs (ΔY) (line 9-line 3)	($7.50)
11.	Change in Taxes Due to New Tax Law (ΔZ)	($10.00)

Calculation of the Price Cap Index -- Method 1

12.	Direct Costs Under New Tax Law (line 4+line 11)	$170.00
13.	Change in Direct Costs from GNP-PI-X (line 12×[line 7]/100)	$1.70
14.	Predicted Change in Total Costs (line 13+line 10+line 11)	($15.80)
15.	Predicted Total Costs (line 14+line 2)	$284.20
16.	Ratio of Predicted to Base Total Costs (line 15/line 2)	.9473
17.	Price Cap Index (line 1×line 16)	94.73

Calculation of the Price Cap Index -- Method 2 (Formula in FNPRM)

18.	Direct Costs Weight (w) (line 12/line 2)	0.567
19.	w(I - X)/100 (line 18×[line 7]/100)	0.00567
20.	ΔY/R (line 10/line 2)	-0.025
21.	ΔZ/R (line 11/line 2)	-0.033
22.	Price Cap Index (line 1×[1+line 19+line 20+line 21])	94.73

Example 3: Introduction of a New Service

This example illustrates the introduction of new services under price caps. The procedure for checking whether the overall price level meets the price cap constraint is essentially unchanged by the introduction of new services. Under our proposal, new services are ignored in the calculation of the API until six months after the end of the first base period in which they have appeared. After that point, they are treated like any other service. As in the previous examples, we will focus on the API and PCI, and not address whether proposed prices fall within the bands that limit the annual movement of individual rate elements.

Table 3 presents the data for this example. The period October 1987 to September 1988 (lines 1 - 6) is exactly the same as in example 1 (see table 1). Since this example illustrates price caps for six months beyond the last period shown in example 1, it is necessary to calculate a base price index and expenditure weights for a second base period. The data presented for October 1988 through March 1989 (lines 7 - 9) serve this purpose.

During the period April 1989 through September 1989 the carrier introduces a new service, "service 3." The carrier sets the price of the new service at $1.00 (line 11), sells 10 units (line 15), and earns revenue of $10.00 (line 16). The new service is ignored in calculating the API and PCI during the period April 1989 through September 1989. The API of 99.17 (line 14) is exactly the same as it was in example 1 (table 1, line 11), because the prices for services 1 and 2 are the same as in example 1, and the new service does not enter the calculation. Likewise the calculation of the PCI is unaffected for this period.

Lines 17 through 23 in table 3 show the calculation of the base price index and expenditure weights for the second base period, October 1988 through September 1989. This information will be used to check the tariffs that the carrier proposes to put into effect April 1, 1990 (six months after the end of the second base period). Line 17 gives the revenue associated with each service. Line 18 shows the quantity of each service sold during the second base period. Line 19 gives the average price of each service during the second base period. It is computed by dividing revenue by quantity. For example, the average price of service 3 is found by dividing the revenue of $10.00 (line 17) by the quantity sold, 10 (line 18), giving an average price per unit of $1.00 (line 19).

The first step in calculating the base price index (BPI) for the second base period is to compute the ratio of the average price of service 1 during the second base period to the average price of that service during the previous base period. Dividing $1.97 (line 19), the average price of service 1 during the second base period, by $2.00 (line 6), the average price of service 1 during the first base period, gives .99 (line 20). The same method is used to compute the ratio of average prices for service 2,

giving 1.01 (line 20). We cannot compute such a ratio for the new service because it was not available during the previous base period.

Next, we calculate the weighted sum of these price ratios, where the weights are the expenditure weights during the first base period. The weighted price ratios (line 21) are found by multiplying each price ratio (line 20) by the corresponding first base period expenditure weight (line 5). For example, for service 1 multiplying the price ratio of .99 (line 20) by the expenditure weight of .67 (line 5) gives .66 (line 21). Adding together the weighted price ratios (columns 1 and 2, line 21) gives .99 (column 4, line 21). (Note that the caveat about rounding errors discussed in example 1, applies here as well.) Multiplying the sum by the base period BPI, 100.00 (line 2), gives the new base price index of 99.54 (line 22).

The expenditure weights for all three services sold during the second base period are shown on line 23. The expenditure weight for service 1, .65 (column 1, line 23), is calculated by dividing the total revenue generated by service 1, $207.25 (column 1, line 17), by total revenue generated by all services, $316.45 (column 3, line 17). The expenditure weights for services 2 and 3 are calculated using the same method.

Lines 24 through 29 are essentially the same as lines 12 through 15 in example 1. While data on service 3 are presented, they do not enter the calculation of the API for this mid-year rate change. As in example 1, the carrier proposes to raise the price of service 2 to $2.10 effective October 1, 1989 while leaving the price of service 1 at $1.95 (line 24). The calculation of the API at these proposed prices is exactly the same as in example 1, giving the same new actual price index of 100.00 (line 27) that we found for this period in example 1.

The new service is subject to price cap regulation for the first time on April 1, 1990. Line 31 shows the prices the carrier proposes for April 1, 1990. In this example the prices are the ones that have prevailed since October 1989. Lines 32 through 34 show steps in the calculation of the API associated with these prices. Line 32 gives the ratio of the proposed price for each service to the average price of that service during the October 1988 to September 1989 base period. For example, the ratio of service 1 prices, .99 (column 1, line 32), was found by dividing the proposed price of service 1, $1.95 (column 1, line 31) by the average price of service 1 during the second base period, $1.97 (column 1, line 19).

Line 33 gives the weighted price ratios for each of the three service. A weighted price ratio is found by multiplying a price ratio (line 32) by the corresponding expenditure weight during the second base period. For example, the weighted price ratio of the new service, .03 (column 3, line 33) is found by multiplying the price ratio of 1.00 (column 3, line 32) by the second base period expenditure weight of .03 (column 3, line 23).

The new API for the April 1990 prices is found by adding these weighted price ratios and multiplying the sum by the base price index from the second base period, 99.54 (line 22), giving 99.91 (line 34). Since this is less than the PCI, which we assume to remain at 100 (line 30), the proposed tariff, including the price of the new service, meets the constraint on the overall price level.

TABLE 3

October 1987 - September 1988 (First Base Period)

Line		Service 1	Service 2	Total
1.	Price Cap Index			100.00
2.	Base Price Index			100.00
3.	Revenue	$200.00	$100.00	$300.00
4.	Quantity	100	50	
5.	Expenditure Wts.	0.67	0.33	
6.	Average Price	$2.00	$2.00	

October 1988 - March 1989

		Service 1	Service 2
7.	Price	$2.00	$2.00
8.	Quantity	50	25
9.	Revenue	$100.00	$50.00

April 1989 - September 1989 (Plan Initiated)

		Service 1	Service 2	Service 3	Total
10.	Price Cap Index				100.00
11.	Price	$1.95	$2.05	$1.00	
12.	P(April)/P(87-88)	0.98	1.03		
13.	Wtd. Price Ratio	0.65	0.34		
14.	Actual Price Index				99.17
15.	Quantity	55	24	10	
16.	Revenue	$107.25	$49.20	$10.00	$166.45

October 1988 - September 1989 (Second Base Period)

		Service 1	Service 2	Service 3	Total
17.	Revenue	$207.25	$99.20	$10.00	$316.45
18.	Quantity	105	49	10	
19.	Average Price	$1.97	$2.02	$1.00	
20.	P(88-89)/P(87-88)	0.99	1.01		
21.	Wtd. Price Ratio	0.66	0.34		.99
22.	Base Price Index				99.54
23.	Expenditure Wts.	0.65	0.31	0.03	1.00

		October 1989 - March 1990			
		Service 1	Service 2	Service 3	Total
24.	Price	$1.95	$2.10	$1.00	
25.	P(Oct.)/P(87-88)	0.98	1.05		
26.	Wtd. Price Ratio	0.65	0.35		
27.	Actual Price Index				100.00
28.	Quantity	55	23	10	
29.	Revenue	$107.25	$48.30	$10.00	$165.55

		April 1990 - March 1991			
		Service 1	Service 2	Service 3	Total
30.	Price Cap Index				100.00
31.	Price	$1.95	$2.10	$1.00	
32.	P(April)/P(88-89)	0.99	1.04	1.00	
33.	Wtd. Price Ratio	0.65	0.33	0.03	
34.	Actual Price Index				99.91

Example 4: Calculating Bands Around Individual Rate Elements

Under our proposal, in addition to the constraint that the overall price level, as measured by the API, be less than the level set by the PCI, there is a constraint on the annual rate of change of individual rate elements. In this example, we will illustrate how this additional constraint is checked, and how the API is calculated if a price falls below the lower bound of its band.

The basic procedure for constructing bands is as follows. First, we adjust the individual prices prevailing on the last day of the base period by the amount of change in PCI between the base period and the date the proposed tariff goes into effect. The upper bound of each band is 5% above, and the lower bound 5% below, the adjusted level of the price at the end of the base period. A carrier may, under certain circumstances, set an individual rate element below the lower bound, but in calculating the API, that price will be treated as if it were at the lower bound. That is, the carrier does not get "credit" in the calculation of the API for reductions below the lower bound of a band.

Table 4 illustrates the calculation of bands that limit the annual change in individual rate elements. Line 2 shows the prices of the two services on September 30, 1988, the last day of the first base period. Both were $2.00. Line 1 shows that the PCI was 100 for the first base period. These numbers are consistent with our previous examples.

In example 2, we calculated a PCI for the initial price cap filing. Under the assumptions made in that example, the PCI was 94.73 (line 17 table 2). This is repeated on line 3 of table 4. The new PCI is 5.27% (line 4) below the base period PCI (line 1). To find the midpoint of the bands around individual price elements we reduce each price prevailing on the last day of the base period by 5.27%. This gives $1.89 for both services (line 5), since both prices were $2.00 at the end of the base period. Next we compute 5% of $1.89, giving $.09 (line 6). The upper bound of the band for each service is found by adding $.09 to $1.89 giving $1.98 (line 7). The lower bound is found by subtracting $.09 from $1.89 giving $1.80 (line 8).

In example 2, we noted that setting the price of service 1 at $1.85 and service 2 at $1.95 would give an API of 94.17 (shown here on line 10), which is below the PCI of 94.73 (line 3). Now we can see that these prices also meet the constraint on individual elements. The price of the first service, $1.85, is below the upper bound of $1.98 and above the lower bound of $1.80. Likewise, the price of the second service, $1.95, is also within the bounds.

Suppose that instead of these prices, the carrier had proposed $1.75 for service 1 and $1.95 for service 2 (line 11). The price of the first service, $1.75, is below the lower bound of its band $1.80. The price of the second service is the same as in the previous example, and is within the

bounds. In calculating the API in this case the carrier would not get credit for reducing the price of service 1 below $1.80. The API is calculated as if the price of service 1 were $1.80. Using the procedure explained in example 1 for calculating the API, with the price of service 1 at $1.80 and the price of service 2 at $1.95 gives an API of 92.50 (line 12). If we had given the carrier full credit for the price cut in service 1, the API would have been 90.83 (line 13). That is, calculating the API at the actual prices gives 90.83.

TABLE 4

Last Day of Base Period (September 30, 1988)

Line		Service 1	Service 2	Total
1.	Price Cap Index (PCI)			100
2.	Price	$2.00	$2.00	

Initial Price Cap Tariff Filing (April 1, 1989)

		Service 1	Service 2	Total
3.	Price Cap Index (PCI)			94.73
4.	% Change in PCI			-5.27%
5.	Midpoint of Band	$1.89	$1.89	
6.	5% of Midpoint	$0.09	$0.09	
7.	Upper Bound of Band	$1.98	$1.98	
8.	Lower Bound of Band	$1.80	$1.80	
9.	Proposed Price (Within band)	$1.85	$1.95	
10.	API			94.17
11.	Proposed Price (Below band)	$1.75	$1.95	
12.	API			92.50
13.	API if given full credit			90.83

APPENDIX E

Proposed Amendments to Code of Federal Regulations

PART 1 -- PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended 47 U.S.C 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. § 1.773(a)(1) is amended as follows:

§ 1.773 Petitions for suspension or rejection of new tariff filings.

(a) * * *

(iv) For the purposes of this section, tariff filings made pursuant to § 61.47(b) by dominant carriers will be considered prima facie lawful, and will not be suspended by the Commission unless the petition shows that the support information required in § 61.47(b) was not provided. If such a showing is not made, then the filing will be considered prima facie lawful and will not be suspended by the Commission unless the petition requesting suspension shows each of the following:

(A) That there is a high probability the tariff would be found unlawful pursuant to section 201 or section 202 of the Communications Act (or pursuant to any other provision of the Communications Act or any other statutory or other legal requirement) after investigation;

(B) That the suspension would not substantially harm other interested parties;

(C) That irreparable injury will result if the tariff filing is not suspended; and

(D) That the suspension would not otherwise be harmful to the public interest.

PART 61 -- TARIFFS

Subpart A -- General

Sec.

61.1 Purpose and application.
61.2 Clear and explicit explanatory statements.
61.3 Definitions.

Subpart B -- General Filing Requirements; Supporting Information

61.32 Method of filing publications.
61.33 Letters of transmittal.
61.35 Delivered free of charges.
61.36 Tariff publications not returned.
61.38 Supporting information to be submitted with letters of transmittal.
61.39 Optional supporting information to be submitted with letters of transmittal for Access Tariff filings effective on or after January 1, 1989, by local exchange carriers serving 50,000 or fewer access lines that are described as subset 3 carriers in § 69.602.
61.40 Private line rate structure guidelines.
61.41 Price cap requirements generally.
61.42 Price cap service groups.
61.43 Initial price cap tariffs; annual filings.
61.44 Adjustments to the PCI.
61.45 Adjustments to the API and BPI.
61.46 Pricing bands.
61.47 Supporting information to be submitted with letters of transmittal for tariffs of carriers electing price cap regulation.

Subpart C -- Specific Rules for Tariff Publications

61.52 Form, size, type, legibility, etc.
61.53 Consecutive numbering.
61.54 Composition of tariffs.
61.56 Supplements.
61.57 Cancellations.
61.58 Notice requirements.
61.59 Effective period required before changes.
61.67 New or discontinued telephone and teletypewriter service points; mileages.
61.68 Special notations.
61.69 Rejection.
61.71 Reissued matter.
61.72 Posting.
61.73 Duplication of rates or regulations.
61.74 References to other instruments.

Subpart D -- Concurrences

61.131 Scope.
61.132 Method of filing concurrences.
61.133 Format of concurrences.
61.134 Concurrences for through services.
61.135 Concurrences for other purposes.
61.136 Revocation of concurrences.

Subpart E -- Applications for Special Permission

61.151 Scope.
61.152 Terms of applications and grants.
61.153 Method of filing applications.

Subpart F -- Adoption of Tariffs and Other Documents of Predecessor Carriers

61.171 Adoption notice.
61.172 Changes to be incorporated in tariffs of successor carrier.

Subpart G -- Suspensions

61.191 Carrier to file supplement when notified of suspension.
61.192 Contents of supplement announcing suspension.
61.193 Vacation of suspension order; supplements announcing same; etc.

1. The authority citation for Part 61 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.3 is added as follows:

§ 61.3 Definitions.

(a) Act. The Communications Act of 1934 (48 Stat. 1004; 47 U.S.C. Chapter 5), as amended.

(b) Actual Price Index (API). A base period-weighted index of the proposed rates in a service group offered by carriers electing price cap regulation.

(c) Association. This term has the meaning given it in § 69.2(c).

(d) Band. An annual zone of flexibility for individual rate elements of services offered under price cap regulation ranging from 5 percent above to 5 percent below the level that prevailed on the last day of the base year, as adjusted by the most recent percentage change in the Price Cap Index.

(e) Base Price Index (BPI). An index of the aggregate revenue-weighted average rates in effect for a service group offered by a carrier electing price cap regulation.

(f) Base year. The 12-month period ending six months prior to the effective date of annual price cap tariffs.

(g) Change in rate structure. A restructuring or other alteration of the rate components for an existing service.

(h) Charges. The price for service based on tariffed rates.

(i) Commercial contractor. The commercial firm to whom the Commission annually awards a contract to make copies of Commission records for sale to the public.

(j) Commission. The Federal Communications Commission.

(k) Concurring carrier. A carrier (other than a connecting carrier) subject to the Act which concurs in and assents to schedules of rates and regulations filed on its behalf by an issuing carrier or carriers.

(l) Connecting carrier. A carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier.

(m) Corrections. The remedy of errors in typing, spelling, or punctuation.

(n) Dominant carrier. A carrier found by the Commission to have market power (i.e., power to control prices).

(o) GNP Price Index (GNP-PI). The 75-day estimate of the "Fixed-Weighted Price Index for Gross National Product, 1982 Weights" published by the United States Department of Commerce.

(p) Issuing carrier. A carrier subject to the Act that publishes and files a tariff or tariffs with the Commission.

(q) Local Exchange Carrier. A telephone company that provides telephone exchange service as defined in section 3(r) of the Act.

(r) New service offering. A tariff filing that provides for a class or sub-class of service not previously offered by the carrier involved and that enlarges the range of service options available to ratepayers.

(s) Non-dominant carrier. A carrier not found to be dominant.

(t) Other participating carrier. A carrier subject to the Act that publishes a tariff containing rates and regulations applicable to the portion of through service it furnishes in conjunction with another subject carrier.

(u) Price Cap Index (PCI). An index of costs facing carriers electing price cap regulation, which index is calculated for each service group.

(v) Price cap regulation. An alternative method of rate regulation that may be elected by eligible dominant carriers pursuant to § 61.41 through § 61.47.

(w) Price cap tariff. Any tariff filing that involves a calculation pursuant to § 61.44 or § 61.45.

(x) Productivity factor. An adjustment factor (3.0 percent) used to make adjustments to the Price Cap Index, which adjustments represent increased output from constant factors of production or constant output from decreased levels of production factor utilization.

(y) Rate. The tariff price per unit of service.

(z) Rate increase. Any change in a tariff which results in an increased rate or charge to any of the filing carrier's customers.

(aa) Rate level change. A tariff change that only affects the actual rate associated with a rate element, and does not affect any tariff regulations or any other wording of tariff language.

(bb) Regulations. The body of carrier prescribed rules in a tariff governing the offering of service in that tariff, including rules, practices, classifications, and definitions.

(cc) Restructured service. An offering which represents the modification of a method of charging or provisioning a service and/or the introduction of a new method of charging or provisioning.

(dd) Service group. Any class or category of tariffed services (1) which is established by the Commission pursuant to price cap regulation; (2)

the rates of which are used to calculate an Actual Price Index and Base Price Index; and (3) the related costs of which are used in calculating adjustments to a Price Cap Index.

(ee) Supplement. A publication filed as part of a tariff for the purpose of suspending or cancelling that tariff, or tariff publication and numbered independently from the tariff page series.

(ff) Tariff. Schedules of rates and regulations filed by common carriers.

(gg) Tariff publication, or publication. A tariff, supplement, revised page, additional page, concurrence, notice of revocation, adoption notice, or any other schedule of rates or regulations.

(hh) Text change. A change in the text of a tariff which does not result in a change in any rate or regulation.

(ii) United States. The several States and Territories, and the District of Columbia, and the possessions of the United States.

3. Sections 61.11, 61.12, 61.13, 61.14, 61.15, 61.16, 61.17, 61.18, 61.19, 61.20, 61.21, 61.22, 61.23, 61.24, 61.25, and 61.26 are removed and reserved.

4. The fifth sentence of section 61.32 is amended as follows:

§ 61.32 Method of filing publications.

* * * Simultaneously with the filing of the publications and by the same means, the issuing carrier must send a copy of the publication, supporting information specified in § 61.38, or, as appropriate, § 61.47, and transmittal letter to the commercial contractor (at its office on Commission premises) and the Chief, Tariff Review Branch. * * *

5. Section 61.33 is amended to redesignate paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f), and to add a new paragraph (c) as follows:

§ 61.33 Letters of transmittal.

* * * * *

(c) In addition to the requirements set forth in paragraph (a) of this section, any carrier choosing to file a price cap tariff must include in the letter of transmittal a statement that the filing is made pursuant to § 61.47.

6. Section 61.33(d), as so redesignated in paragraph 6, supra, is amended as follows:

(d) In addition to the requirements set forth in paragraphs (a), (b), and (c) of this section, the letter of transmittal must specifically reference by number any special permission necessary to implement the tariff publication. Special permission must be granted prior to the filing of the tariff publication, and may not be requested in the transmittal letter.

7. Section 61.38(a) is revised by adding a new sentence at the end thereof as follows:

§ 61.38 Supporting information to be submitted with letters of transmittal.

(a) * * * This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in § 61.42(a), (b), and (d), which filings are submitted by carriers that have elected price cap regulation pursuant to § 61.43(a).

8. Section 61.39(a) is amended by adding a new sentence at the end thereof as follows:

§ 61.39 Optional supporting information to be submitted with letters of transmittal for Access Tariff filings effective on or after January 1, 1989, by local exchange carriers serving 50,000 or fewer access lines that are described as subset 3 carriers in § 69.602.

(a) * * * This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in §§ 61.42(a), (b), and (d), which filings are submitted by carriers that have elected price cap regulation pursuant to § 61.43(a).

9. Sections 61.41 through 61.47 are added as follows:

§ 61.41 Price cap requirements generally.

(a) Sections 61.42 through 61.47 apply to eligible dominant carriers that elect price cap regulation pursuant to § 61.43.

(b) Any dominant carrier that is not an Association tariff participant for tariffed access service as of April 1, 1989, and has notified the Association, in accordance with § 69.3(e)(9), that it no longer will be a

participant in the Association Carrier Common Line tariff effective April 1, 1989, is eligible to elect price cap regulation. If a telephone company, or any one of a group of affiliated telephone companies, files a price cap tariff in any study area, that telephone company and it affiliated companies must file price cap tariffs in all of their study areas.

§ 61.42 Price cap service groups.

(a) Subject to the limitations established in paragraphs (c) and (d) of this section, each dominant interexchange carrier electing price cap regulation must establish two service groups containing, respectively, (1) private line services; and (2) message services.

(b) Subject to the limitations established in paragraphs (c) and (d) of this section, each dominant local exchange carrier electing price cap regulation must establish two service groups containing, respectively, (1) switched access services; and (2) all other tariffed interstate services.

(c) The following services must be excluded from service groups subject to price cap regulation:

(1) For dominant interexchange carriers -- (i) special construction services; (ii) American Telephone and Telegraph Company Tariff F.C.C. No. 12 services; and (iii) other services subject to below-the-line accounting requirements.

(2) For dominant exchange carriers -- (i) the Carrier Common Line element, until July 1, 1990; (ii) special construction services; and (iii) individual case basis services.

(d) New services, other than those covered by paragraph (c) of this section, must be included in the appropriate service group at the first annual price cap tariff filing following completion of the base year in which they are introduced.

§ 61.43 Initial price cap tariffs; annual filings.

(a) Eligible dominant carriers may elect price cap regulation as follows:

(1) Dominant local exchange carriers may elect price cap regulation by filing initial price cap tariffs December 30, 1988, to be effective April 1, 1989.

(2) Dominant interexchange carriers may elect price cap regulation by filing initial price cap tariffs February 16, 1989, to be effective April 1, 1989.

(b) The initial price cap tariff filing described in paragraph (a) of this section shall include:

(1) A list of each ratable element for each service contained in a service group;

(2) The proposed rate for each ratable element identified in subparagraph (b)(1) of this section;

(3) The total revenues generated during the base year by each ratable element identified in subparagraph (b)(1) of this section;

(4) The quantity of each ratable element identified in subparagraph (b)(1) sold during the base year;

(5) For each service group, the access costs and the other exogenous cost changes identified in § 61.44(c) during the base year;

(6) For each service group, a Price Cap Index (PCI) value, calculated pursuant to the methodology provided in § 61.44(b), and premised upon an initial value of 100 for the variable designated as "PCI(base)" in the formula contained in § 61.44(b);

(7) For each service group, an Actual Price Index (API) value, calculated pursuant to the methodology provided in § 61.45(a), and premised upon a Base Price Index (BPI) value of 100.

(c) Carriers electing price cap regulation must submit annual price cap tariff filings that make appropriate adjustments to their PCI and BPI values pursuant to §§ 61.44 and 61.45(b), that incorporate new services into the API or BPI calculations values pursuant to § 61.45(c), and that propose rates for the upcoming year. Carriers may propose rate or other tariff changes more often than annually, consistent with the requirements of § 61.59.

§ 61.44 Adjustments to the PCI.

(a) Except as otherwise provided, each carrier electing price cap regulation must annually adjust the PCI for each service group as part of the annual price cap tariff filing.

(b) Adjustments to each PCI must be made pursuant to the following formula:

$$PCI(new) = PCI(base)[1.0 + w(I - X)/100 + \Delta Y/R + \Delta Z/R]$$

where I = the percent change in the GNP-PI during the base year,

X = a productivity factor of 3.0%,

w = base year gross revenues, minus base year access costs and net of ΔZ, all divided by base year gross revenues,

ΔY = the dollar magnitude, at base year demand levels, of any change in access charges for the upcoming tariff year,

ΔZ = the dollar magnitude, at base period levels of operations, of exogenous cost changes identified in paragraph (c) of this section, and

R = base year gross revenues.

(c) The exogenous cost changes represented by the term "ΔZ" in the formula detailed in paragraph (b), include those caused by (1) changes in tax laws; (2) the completion of the amortization of depreciation reserve deficiencies and inside wiring costs; (3) changes in the Uniform System of Accounts; and (4) changes in the Separations Manual.

(d) The costs and revenues of new services subject to price cap regulation must be included in the appropriate PCI calculations under paragraph (a) of this section beginning at the first annual price cap tariff filing following completion of the base year in which they are introduced.

(e) In the event that a price cap tariff becomes effective, which tariff results in an API value (calculated pursuant to § 61.45(a)) that exceeds the currently applicable PCI value, the PCI value shall be adjusted upward to equal the API value.

§ 61.45 Adjustments to the API and BPI.

(a) In connection with any price cap tariff filing proposing rate changes, the carrier must calculate an API for each affected service group pursuant to the following methodology:

$$API = BPI[\sum_i v_i \ (p2/p1)_i]$$

where BPI = the most recent BPI calculated pursuant to paragraph (b) of this section,

v = the ratio of revenues generated by a ratable element during the base year to the service group's total revenues during the base year,

p2 = the proposed price of a ratable element, subject to any banding limitations described in § 61.46,

p1 = the average price of a ratable element offered during the base year, determined by dividing the revenue generated by the element during the base year by the quantity of units sold, and

i = the ratable elements in the service group.

(b) Each carrier electing price cap regulation must calculate a BPI for each service group for the most recently completed base year as part of the annual price cap tariff filing. This calculation must be made pursuant to the following methodology:

$$BPI = BPI(\text{previous year})[\sum_i v_i \ (p2/p1)_i]$$

where

BPI(previous year) = the BPI from the base year preceding the most recently completed base year,

p2 = the average price (revenue divided by quantity) of a ratable element during the most recently completed base year,

p1 = the average price (revenue divided by quantity) of a ratable element during the base year preceding the most recently completed base year,

v = the ratio of revenues generated by a ratable element during the base year preceding the most recently completed

base year to the service group's total revenues during that base year, and

i = the ratable elements in the service group.

(c) New services subject to price cap regulation must be included in the appropriate API calculations under paragraph (a) of this section beginning at the first annual price cap tariff filing following completion of the base year in which they are introduced. New services subject to price cap regulation must be included in the appropriate BPI calculations under paragraph (b) of this section at the second annual price cap filing following completion of the base year in which they are introduced.

(d) Any price cap tariff filing proposing rate restructuring shall require an adjustment to the API pursuant to the general methodology described in paragraph (a) of this section. This adjustment shall measure the change that would result in the total cost of purchasing the bundle of services for which restructuring is proposed. This calculation may require use of estimation techniques to assign customers of the withdrawn service to those services (including the substitute service) that will remain or become available in the service group.

(e) In calculating adjustments to the API pursuant to paragraph (a) of this section, any portion of a proposed rate reduction for a ratable element that falls below the applicable band limit established pursuant to § 61.46 shall be disregarded.

§ 61.46 Pricing bands.

Pricing bands shall be established each tariff year for each ratable element contained in a service group. Each band shall define a zone within 5 percentage points above or below an amount equal to the rate that prevailed on the last day of the base year, increased or decreased (as appropriate) by the percent change in the current PCI compared to the immediately preceding PCI.

§ 61.47 Supporting information to be submitted with letters of transmittal for tariffs of carriers electing price cap regulation.

(a) Each price cap tariff filing must be accompanied by supporting materials sufficient to calculate required adjustments to each API pursuant to the methodology provided in § 61.45(a), and each annual price cap filing must be accompanied by supporting materials sufficient to calculate new PCI and BPI values pursuant to the methodologies provided in §§ 61.44 and 61.45(b), respectively.

(b) Each price cap tariff filing that proposes rates that are within applicable bands established pursuant to § 61.46, and that results in an API value that is equal to or less than the applicable PCI value, must be accompanied by supporting materials sufficient to establish compliance with the applicable bands and to calculate the necessary adjustment to the API pursuant to § 61.45(a).

(c) Each price cap tariff filing that proposes a rate that is above applicable band limit must be accompanied by supporting materials establishing substantial cause for the proposed above-band rate.

(d) Each price cap tariff filing that proposes a rate below an applicable band limit must be accompanied by supporting materials sufficient to demonstrate that the proposed rate will cover the cost of providing the corresponding service.

(e) Each price cap tariff filing that proposes rates that will result in an API value that exceeds the applicable PCI value must be accompanied by cost data for each ratable element in the service group for each of the previous four years under price cap regulation, and a detailed explanation of the carrier's cost allocation methodology for each ratable element for each year.

(f) Each price cap tariff filing that proposes restructuring of existing rates must be accompanied by supporting materials sufficient to make the adjustments to each affected API required by § 61.45(d).

(g) Each tariff filing that introduces a new service that will later be included in an appropriate service group and reflected in the service group's API pursuant to § 61.45(c) and PCI pursuant to § 61.44(d) must be accompanied by cost data sufficient to establish that the new service, and each unbundled element thereof, will generate a net revenue increase -- measured against revenues generated from services in the applicable service group, and calculated based upon present value -- within the lesser of a 24-month period after an annual price cap tariff including the new service takes effect, or 36 months from the date the new service becomes effective.

10. Section 61.58 is amended to redesignate paragraph (c) as paragraph (d), and to add a new paragraph (c) as follows:

§ 61.58 Notice requirements.

* * * * *

(c) Carriers electing price cap regulation. This paragraph applies only to carriers electing price cap regulation. Such carriers must file tariffs according to the following notice periods.

(1) For annual adjustments to the PCI values under § 61.44 and the BPI values under § 61.45(b), local exchange carrier tariffs must be filed on not less than 90 days' notice, and interexchange carrier tariffs must be filed on at least 45 days' notice.

(2) Tariff filings that alter rate levels only, and that (i) do not cause any API to exceed any applicable PCI pursuant to calculations provided for in § 61.45(a); and (ii) do not cause the price of any ratable element to exceed its banding limitations established in § 61.46, must be filed on at least 14 days' notice.

(3) Tariff filings that would cause any API to exceed any applicable PCI pursuant to calculations provided for in § 61.45(a), or that would cause a price for a ratable element to exceed its banding limitations established in § 61.46, must be filed on at least 90 days' notice.

(4) Tariff filings that would cause a price for a ratable element to fall below its banding limitations established in § 61.46 must be filed on at least 45 days' notice.

(5) Tariff filings involving a change in rate structure of a service covered by § 61.42(a) or (b), or the introduction of a new service covered by § 61.42(d), must be made on at least 45 days' notice.

(6) The required notice for tariff filings made by dominant carriers involving services covered by § 61.42(c), or involving changes to tariff regulations, shall be that required in connection with such filings by dominant carriers that have not elected price cap regulation.

11. The first sentence of section 61.58(d), as so redesignated in paragraph 11, supra, is amended as follows:

(d) Other carriers. (1) Tariff filings in the instances specified in paragraphs (d)(1) (i), (ii) and (iii) of this section must be made on at least 15 days' notice.

PART 65 -- INTERSTATE RATE OF RETURN PRESCRIPTION PROCEDURES AND METHODOLOGIES

1. The authority citation for Part 65 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 65.1 is amended as follows:

§ 65.1 Application of Part 65.

This part establishes procedures and methodologies for Commission prescription of interstate rates of return. This part shall apply to those interstate services and carriers as the Commission shall designate by Order. This part and the existing rate of return prescription shall not apply to carriers subject to §§ 61.41 through 61.47, except as set forth in §§ 65.600(b), (d), and (e), 65.701(c), and 65.703(g).

3. Section 65.200 is amended as follows:

§ 65.200 State authorized returns for exchange carriers.

(a) * * *

(b) Notwithstanding any other provision of this section, paragraph (a) of this section shall only apply (except as hereafter provided) to those exchange carriers and exchange carrier holding companies that are not subject to §§ 61.41 through 61.47 and that: * * *

4. Section 65.600 is amended as follows:

§ 65.600 Rate of return reports.

(a) * * *

(b) Each local exchange carrier or group of affiliated carriers which is not subject to §§ 61.41 through 61.47 and which has filed individual access tariffs during the preceding enforcement period shall file with the Commission within three (3) months after the end of each calendar quarter, a quarterly rate of return monitoring report. Each report shall contain two parts. The first part shall contain rate of return information on a cumulative basis from the start of the enforcement period through the end of the quarter being reported. The second part shall contain similar information for the most recent quarter. The final quarterly monitoring report for the entire enforcement period shall be considered the enforcement period report. Reports shall be filed on the appropriate report form prescribed by the Commission (see § 1.795 of this chapter) and shall provide full and specific answers to all questions propounded and information requested in the currently effective report form. The number of copies to be filed shall be specified in the applicable report form. At least one

copy of the report shall be signed on the signature page by the responsible officer. A copy of each report shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection. Final adjustments to the enforcement period report shall be made by September 30 of the year following the enforcement period to ensure that any refunds can be properly reflected in an annual access filing. For carriers subject to §§ 61.41 through 61.47, final adjustments to the final enforcement period report covering the period from January 1, 1987, through March 31, 1989, shall be made no later than December 29, 1989.

(c) * * *

(d) Each interexchange carrier subject to §§ 61.41 through 61.47 shall file with the Commission, within three (3) months after the end of each calendar year, the total interstate rate of return for that year for all interstate services subject to regulation by the Commission. Each such filing shall include a report of the total revenues, total expenses and taxes, operating income, and the rate base, as calculated according to § 65.800. A copy of the filing shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection.

(e) Each local exchange carrier or group of affiliated carriers subject to §§ 61.41 through 61.47 shall file with the Commission within three (3) months after the end of each calendar year a report of its total interstate access rate of return for that year. Such filings shall include a report of the total revenues, total expenses and taxes, operating income, and the rate base, as calculated according to § 65.800. Until October 1, 1990, such carriers shall also file a second report within three (3) months after the end of each calendar quarter to include the total interstate rate of return for the common line element of access for each jurisdiction for which separate tariffs were in effect. Carriers filing this second report shall proceed as required in subsection (b) of this section. Copies of both filings shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection.

5. Section 65.701 is amended as follows:

§ 65.701 Period of review.

(a) * * *

(b) * * *

(c) Notwithstanding other provisions in this subpart, the final period of review for any local exchange carrier electing price cap regulation (as

defined in § 61.3(v)) shall conclude the day preceding implementation of price caps for that carrier. For exchange carriers subject to price cap regulation effective April 1, 1989, the final review period shall begin January 1, 1987, and shall end on March 31, 1989.

6. Section 65.703 is amended as follows:

§ 65.703 Refunds.

(a) For carriers not subject to §§ 61.41 through 61.47, refunds shall be effected automatically if a carrier's earnings for any category of services, as set forth in § 65.702, exceed the maximum allowable rate of return. In determining whether a carrier's earnings exceed the maximum allowable rate of return, the reports filed by a carrier shall be deemed conclusively binding on the carrier.

(b) * * *

(c) * * *

(d) * * *

(e) For exchange carriers not subject to §§ 61.41 through 61.47, tariffs reflecting the revenue requirement reductions effectuating the refund shall be filed by the carrier to become effective no later than January 1 of the year following the submission of the final report for the earning review period.

(f) For interexchange carriers subject to this Part but not subject to §§ 61.41 through 61.47, tariffs reflecting the revenue requirement reductions effectuating the refund shall be filed on 45 days' notice no later than 60 days after submission of the final report for the earnings review period.

(g) For all exchange carriers and interexchange carriers subject to §§ 61.41 through 61.47, refund obligations incurred prior to the effective date of §§ 61.41 through 61.47 shall be effectuated by an adjustment to the applicable Base Price Index, Actual Price Index, and Price Cap Index (as defined in § 61.3). Carriers making an adjustment to effectuate any outstanding refund requirements from the final enforcement period shall make such adjustments no later than during the next scheduled annual price cap adjustment tariff filing following the submission of the final enforcement report. The adjustment shall be designed to complete the required refund within 12 months, following which the Actual Price Index or the Price Cap Index shall be adjusted to remove the effect of the adjustment.

PART 69 -- ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 69.1 is revised as follows:

§ 69.1 Application of access charges.

* * * * *

(b) Charges for such access services shall be computed, assessed, and collected and revenues from such charges shall be distributed as provided in this part, except that the following provisions of this part shall apply only to telephone companies that have not elected to be subject to price cap regulation pursuant to § 61.43 or, to the extent companies have elected price cap regulation, the following sections, if applicable, shall apply to these companies' carrier common line charge: Sections 69.3(f), 69.103(b), 69.106(b), 69.109(b), 69.111(c), 69.112(a), 69.112(b)(2), 69.112(b)(3), 69.112(d)(2), 69.112(d)(3), 69.113(b), 69.113(d), 69.205(d)(1), 69.205(f), 69.301 through 69.310, and 69.401 through 69.414.

3. Section 69.3 is revised as follows:

§ 69.3 Filing of access service tariffs.

(a) Except as provided in 69.3(f) and 69.3(g), a tariff for access service shall be filed with this Commission for an annual period. Such tariffs shall be filed so as to provide a minimum of 90 days' notice with a scheduled effective date of January 1. Such tariff filings shall be limited to rate level changes.

* * * * *

(e) * * *

(4)(i) Except for charges subject to price cap regulation under Part 61 of this chapter, any charge in such a tariff that is not an association charge must be computed to reflect the combined investment and expenses of all companies that participate in such a charge;

(ii) Carriers subject to price cap regulation shall be required to adhere to the requirements of subsection (4)(i) only in filing carrier common line charges;

(g) Telephone companies electing price cap regulation shall file with this Commission a price cap tariff for access service for an annual period. Such tariffs shall be filed so as to provide a minimum of 90 days' notice with a scheduled effective date corresponding to the effective date of all other annual access service tariffs. Such tariff filings shall be limited to changes in the Price Cap Indices and Base Price Indices, rate level changes (with corresponding adjustments to the appropriate Actual Price Indices), and the incorporation of new services into the affected indices.

4. Section 69.111(a) is revised as follows:

§ 69.111 Common transport.

(a) A charge that is expressed in dollars and cents per access minute shall be assessed upon all interexchange carriers that use switching or transmission facilities that are apportioned to the Common Transport element for purposes of apportioning net investment, or that are equivalent to those facilities for companies subject to price cap regulation under Part 61 of this chapter.

5. Section 69.113(a) is revised as follows:

§ 69.113 Special access.

(a) Appropriate subelements shall be established for the use of equipment or facilities that are assigned to the Special Access element for purposes of apportioning net investment, or that are equivalent to such equipment or facilities for companies subject to price cap regulation under Part 61 of this chapter.

6. Section 69.205 is revised as follows:

§ 69.205 Transitional premium charges.

* * * * *

(d)(1) Except for telephone companies electing price caps pursuant to § 61.43, the charge for an LS2 premium access minute shall be computed by dividing the premium Local Switching revenue requirement by the sum of the projected LS2 premium access minutes and a number that is computed by multiplying the projected LS1 premium access minutes by the applicable LS1 transition factor. The charge for an LS1 premium access minute shall be computed by multiplying the charge for an LS2 premium access minute by the applicable LS1 transition factor. The premium Local Switching revenue requirement shall be computed by subtracting the projected revenues from non-premium charges attributable to the Local Switching element from the revenue requirement for each element.

(2) For telephone companies electing price caps, the charge for an LS1 premium access minute shall be computed by multiplying the charge for an LS2 premium access minute by the applicable LS1 transition factor.

7. Section 69.206(c) is amended as follows:

§ 69.206(c) Transitional non-premium charges for MTS-WATS equivalent services.

* * * * *

(c) The transitional non-premium charge for the Local Switching element shall be computed by multiplying a hypothetical premium charge for such element by .45. Except as noted below, the hypothetical premium charge for such element shall be computed by dividing the annual revenue requirement for such element by the sum of the projected premium access minutes for such element for such period and a number that is computed by multiplying the projected non-premium minutes for such element for such period by .45. For telephone companies that elect price cap regulation pursuant to § 61.43, the hypothetical premium charge for such element shall be computed by setting a premium LS2 rate that assumes the LS1 transition factor is 1.00.

8. (a) Section 69.415 is added as follows:

§ 69.415 Apportionment of certain exogenous costs for companies regulated under price caps.

Companies that elect price cap regulation shall apportion the exogenous costs identified in § 61.44(c) between price cap service groups, as defined in § 61.3(dd), on a cost causation basis, or where cost causation is not practicable, pursuant to a fully distributed cost methodology.

(b) The table of contents for Part 69 is amended by adding after the item relating to § 69.414 the following new item:

69.415 Apportionment of certain exogenous costs for companies regulated under price caps.

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